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IN THE

Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,

Petitioners,

v.

ROGER AARONS ET AL.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment categorically permit officers to detain occupants of a residence for several hours during the execution of a search warrant – without regard to the facts that the search is merely for financial records and that the individuals represent no threat but instead are dramatically outnumbered by the officers – as the Fourth Circuit held in conflict with the Ninth and Tenth Circuits?

2. When a claim against the United States under the Federal Tort Claims Act (FTCA) is dismissed, does the FTCA's judgment bar, 28 U.S.C. § 2676, require dismissal of independent claims against individual federal officials in the same complaint, as the Fourth Circuit held in conflict with the Ninth Circuit?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Fourth Circuit.

Petitioners here and appellants below are Aysha Nudrat Unus and Hanaa Unus.

Respondents here and appellees below are Roger Aarons, Special Agent, DHS-ICE; Camille Barnett, Special Agent, DHS-ICE; Byron Braggs, Senior Special Agent, ICE; Jennifer Crandall, Special Agent, DHS-ICE; Francisco Gerardo, Special Agent, ICE; Antonio Gomez, Special Agent, IRS; Stasia A. McMahon, Special Agent, IRS; Elmer R. Mooring, Sr., Postal Inspector; Michael R. O'Hanlon, Special Agent, IRS; Kenneth W. Oland, Special Agent, IRS; United States of America; Michael J. Zens, Special Agent, United States Secret Service.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Aysha Nadrat Unus and Hanaa Unus respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion is reported at 565 F.3d 103 (4th Cir. 2009). Petitioners' Appendix ("App.") A. The district court's relevant orders are unpublished. App. B.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. On July 27, 2009, Chief Justice

Roberts extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009. App. 09A101. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const., amend IV.

The Federal Tort Claims Act provides, in relevant part: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

STATEMENT

Federal officers executed a search warrant upon petitioners' family residence, searching for financial records allegedly possessed by another family member. The officers detained petitioners, placed them in handcuffs, and held them for four hours. The Fourth Circuit held that petitioners' civil rights suit must be dismissed. Regarding petitioners' claim under the Fourth Amendment, the court of appeals held that officers are categorically permitted to detain residents in handcuffs during the course of

any search. According to the court of appeals, it made no difference to the "reasonableness" of the detention that the search was merely for financial records (rather than contraband) and that petitioners presented no danger. The Fourth Circuit further held that petitioners' distinct claim against individual officers must be dismissed under the judgment bar of the Federal Tort Claims Act (FTCA) because the court had sustained the dismissal of petitioners' distinct claim under the FTCA.

1. In early 2002, federal agents secured a warrant to search the residence of Dr. Iqbal Unus. The warrant application "swore that there was probable cause to believe that evidence of federal law violations would be found in the Unus residence in the form of [certain organizations'] financial records." App. 8a-9a. Those organizations were suspected of being a component of a supposed network of groups ultimately providing financial support for groups involved with international terrorism. App. 6a. All the members of the Unus family are United States citizens; none has a criminal record. App. 2a.

Eleven federal agents and three local police officers executed the warrant on March 20, 2002. Home at that time were Dr. Unus' wife and eighteen-year-old daughter, petitioners Aysha and Hanaa Unus. At 10:30 a.m., the agents began "pounding" on the front door of the Unus residence. App. 9a. After seeing a gun through the side window of the door, Aysha screamed for Hanaa, who was upstairs sleeping, and the two of them called 911 from the living room. App. 9a-10a. At this point, less than one

minute after the initial door-pounding, App. 27a, the officers broke through the front door with a battering ram and stormed in with guns drawn, App. 10a. One officer pointed his gun at Aysha and ordered her to drop the phone. App. 10a.

The agents handcuffed both Aysha and Hanaa behind their backs in the living room and kept both women handcuffed for approximately four hours while they searched the residence. App. 10a.

At that time, Aysha and Hanaa informed the agents that they were obligated to perform their ritual cleansing and afternoon prayers, in accordance with their Muslim faith. App. 10a. The agents permitted the women to pray, without handcuffs, but refused to let the women pray outside the presence of the male agents, and refused to let the women wear headscarves or cover their hands as required by their faith. App. 10a-11a. After petitioners prayed, the agents did not reapply the handcuffs, but they were confined to the living room for the remainder of the search, which concluded approximately one hour later. App. 11a.

At the conclusion of the search, the agents seized two computers and several boxes of documents. App. 11a. Neither the particular search of petitioners' residence nor the associated investigation resulted in any charges, and the government eventually returned most of the seized records. App. 11a n.8.

2. Petitioners and Dr. Unus subsequently filed this suit in the U.S. District Court for the Eastern

District of Virginia. As is relevant here, petitioners alleged a violation of their First and Fourth Amendment rights and sought damages from the individual officers under *Bivens v. Six Unknown Named Fed. Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Separately, petitioners brought claims against the United States pursuant to the FTCA, 28 U.S.C. § 2679(d)(1), for assault-and-battery, false imprisonment, and trespass.

The district court dismissed petitioners' Fourth Amendment claim against the federal agents, ruling that the agents were entitled to qualified immunity, App. 19a., and dismissed petitioners' First Amendment claim as moot, App. 21a. The district court entered summary judgment in favor of the United States on petitioners' FTCA claims. App. 20a-21a.

4. The Fourth Circuit affirmed the district court's judgment in relevant part.

With respect to petitioners' Fourth Amendment claim, the Fourth Circuit upheld the initial detention of petitioners, the officers' decision to place them in handcuffs, and the continued application of the handcuffs for four hours. According to the court of appeals, officers have a categorical right to initially detain occupants during the execution of any search warrant: "The federal agent defendants were executing a facially valid search warrant for the Unus residence, and the plaintiffs were—unfortunately for them—occupants of the residence at the time of the search." App. 30a-31a.

The Fourth Circuit concluded that the officers furthermore acted reasonably in placing petitioners in handcuffs. The court of appeals found it dispositive that "the agents did not know whether they would be confronted by resistance" and had "encountered hectic conditions," because "there was 'excitement' in the plaintiffs' voices, and the plaintiffs were 'clearly concerned and worried and agitated.'" App. 32a.

Finally, the Fourth Circuit held that the officers acted reasonably when they kept "the plaintiffs detained in handcuffs for nearly four hours." App. 32a. The court of appeals relied on the following testimony of the officer with control over petitioners' detention:

> [Agent] McMahon further explained that, after "things had calmed down a bit," she moved the handcuffs from the back to the front of the plaintiffs to make them more comfortable. At that point, however, McMahon explained that she "simply wasn't comfortable . . . going from cuffed to totally not cuffed." The agents reassessed the situation as the search progressed, however, entirely removing the handcuffs after the women performed their afternoon prayers. "It was a progression of just a general sense of we're progressing with the warrant," McMahon explained. "[I]t was just a different moment," McMahon recalled, "and I made a different decision [to remove the handcuffs]."

App. 32a-33a. (citations omitted, second and third alterations in original). Based on that testimony, the Fourth Circuit found it "clear that the federal agent defendants reasonably assessed the circumstances presented, balancing the law enforcement interest of safety—of both the agents and the plaintiffs—with the 'marginal intrusion' imposed on the plaintiffs." App. 33a.

The court of appeals further held that the United States was entitled to summary judgment on petitioners' remaining assault-and-battery and false imprisonment claims under the FTCA on the ground that the officers were entitled to forcibly enter the home and to draw weapons "in order to gain control of a fluid situation and ensure the safety of all involved." App. 28a.

On that basis, the court of appeals held that petitioners' *Bivens* claims asserting that the individual officers violated their First Amendment rights of religious freedom must be dismissed as well. According to the court of appeals, the FTCA's judgment bar, 28 U.S.C. § 2676, precluded petitioners from pursuing their *Bivens* claims against the federal agent defendants. *See* App. 36a. That statute provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. In the view of the Fourth Circuit, the bar is not limited to the preclusive effect of *prior* judgments dismissing FTCA claims, but

applies even when the FTCA claim is dismissed in the course of the *same* suit as the claim under *Bivens*. App. 35a-36a. The court of appeals accordingly held that petitioners could not pursue their claims that the individual officers had violated their First Amendment rights of religious freedom in refusing to allow them to conduct prayers free from interference – claims that petitioners notably could *not* have brought against the government itself because they have no common law analog and cannot be brought under the FTCA. *See* App. 36a.

REASONS FOR GRANTING THE WRIT

Both of the questions presented merit this Court's review. The Fourth Circuit's holding that officers acted reasonably under the Fourth Amendment in detaining petitioners, handcuffing them, and holding them in handcuffs for four hours despite any circumstances warranting those detentions conflicts with this Court's precedents and with uninterrupted lines of decisions from two other circuits. The Fourth Circuit's further holding that the dismissal of petitioners' common law FTCA claims against the United States required dismissal of petitioners' distinct constitutional tort claims against the individual officers for violating petitioners' right to freedom of religion is the subject of an acknowledged circuit split. Both questions recur frequently, and only this Court can bring needed uniformity to these important issues of federal law. Certiorari accordingly should be granted.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE FOURTH CIRCUIT'S HOLDING THAT OFFICERS EXECUTING A SEARCH WARRANT FOR FINANCIAL RECORDS MAY DETAIN IN HANDCUFFS FOR SEVERAL HOURS OCCUPANTS WHO PRESENT NO THREAT.

This Court has articulated clear limits on the power of police officers executing a search warrant to detain individuals, hold them in handcuffs, and continue the detention for several hours during a search. The Ninth and Tenth Circuits have faithfully applied this Court's precedents. The Fourth Circuit, by contrast, has abrogated those limits and created an unquestionable circuit conflict by holding that the detention in this case was reasonable under the Fourth Amendment. Because federal, state, and local officers execute hundreds of search warrants *every day*, it is difficult to imagine a question on which this Court's clear guidance is more important.

A. THE RULING BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

1. In *Michigan v. Summers*, 452 U.S. 692, 693 (1981), officers preparing to "execute a warrant to search a house for narcotics" encountered and detained one of the occupants for the duration of the search. This Court upheld the detention on the ground that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at

705. The Court reserved the question "whether the same result would be justified if the search warrant merely authorized a search for evidence." *Id.* at 705 n.20.

In *Muehler v. Mena*, 544 U.S. 93, 95 (2005), officers investigating "a gang-related, driveby shooting" executed a search warrant on the residence of a gang member to search for contraband, including "deadly weapons." The search carried a "high degree of risk," calling for the use of "a Special Weapons and Tactics (SWAT) team." *Id.* at 95-96. When the officers encountered four occupants (including the respondent), two officers detained them in handcuffs in a separate converted garage for two to three hours. *Id* at 96.

This Court first held that the initial detention of the respondent was justified on the basis of *Summers*, *supra*. When "executing a search warrant for contraband," the Court explained, "'[a]n officer's authority to detain incident to a search is categorical." 544 U.S. at 98. "*Summers* makes clear that when a neutral magistrate has determined police have probable cause to believe contraband exists, '[t]he connection of an occupant to [a] home' alone 'justifies a detention of that occupant.'" *Id.* at 99 n.2 (quoting *Summers*, 452 U.S. at 703-04).

The Court then turned to the distinct question of whether the officers violated the Fourth Amendment by detaining the respondent with handcuffs, which had not occurred in *Summers*, and which "was undoubtedly a separate intrusion in addition to detention in the converted garage." 544 U.S. at 99.

The Court upheld the use of the handcuffs because "this was no ordinary search": the warrant "authorize[d] a search for weapons and a wanted gang member reside[d] on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants." *Id.* at 100.

Finally, the Court addressed the justification for continuing the use of handcuffs for two to three hours. The Court found that extended period justified because "this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons." *Id.* at 100.

Justice Kennedy – who provided a fifth vote for the Court's opinion – deemed it "important" to write separately "to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged." *Id.* at 102. In his view, the reasonableness requirement of the Fourth Amendment calls for handcuffs to "be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search." *Id.* at 103.

Justice Kennedy used the facts of the detention in *Muehler* to illustrate the reasonableness inquiry: "The time spent in the search here, some two to three hours, certainly approaches, and may well exceed, the time beyond which a detainee's Fourth Amendment interests require revisiting the necessity of handcuffing in order to ensure the restraint, even

if permissible as an initial matter, has not become excessive." 544 U.S. at 103. But Justice Kennedy found dispositive that "during much of this search 2 armed officers were available to watch over the 4 unarmed detainees," such that "[w]here the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified." *Id.*

2. The ruling below cannot be reconciled with this Court's decisions in *Summers* and *Muehler*. The officers' conduct violated the Fourth Amendment at every turn, from the initial detention of petitioners, to the application of handcuffs, to the continued detention in handcuffs for four hours.

The search in this case involved neither contraband nor any danger to the officers. The search warrant sought only financial records. The fourteen officers had no reason whatsoever to anticipate that the scene would be remotely dangerous or to believe that petitioners had committed a crime. They instead encountered two women who presented no threat. Indeed, when the agents broke down their door, petitioners were anxiously calling *the police*, obviously believing that they were the victims of an armed home invasion.

The Fourth Circuit nonetheless upheld the initial detention as a matter of law – without regard to the circumstances – on the ground that respondents "were executing a facially valid search warrant for the Unus residence, and the plaintiffs were—

unfortunately for them—occupants of the residence at the time of the search." App. 30a-31a. This Court, by contrast, has carefully cabined the authority to detain occupants to the distinct circumstance in which officers are executing "a warrant to search for contraband," as opposed to instances (such as this case) in which "the search warrant merely authorized a search for evidence." *Summers*, 452 U.S. at 705 & n.20. The "categorical" authority to detain the occupants of a residence that the Fourth Circuit adopted here is in fact limited to "a search warrant for contraband." *Muehler*, 544 U.S. at 98.

The court of appeals specifically rejected petitioners' submission that this Court in *Summers* and *Muehler*, had authorized detention and continued handcuffing of residents only in the context of searches for contraband, whereas here officers "were searching for financial documents only—and not for either weapons or persons." App. 31a. "We see this as a distinction without a difference, however, as the rationale underlying *Summers* and *Muehler* applies equally to situations where agents are seeking evidence of federal crimes." App. 29a n.22.

The conflict between the ruling below and this Court's precedents extends to the Fourth Circuit's further holding that it was reasonable under the Fourth Amendment for the officers to place petitioners in handcuffs. Petitioners did not resist being detained by the officers in any respect and, as noted, presented no threat of any sort. The Fourth Circuit nonetheless held that the officers' conduct was reasonable because "the agents did not know

whether they would be confronted by resistance" and "there was 'excitement' in the plaintiffs' voices, and the plaintiffs were 'clearly concerned and worried and agitated.'" App. 32a. None of those circumstances materially differentiate this search from almost any other or limit the sweep of the court of appeals' ruling. Resistance is *conceivable* whenever any search warrant is executed, and it is all but inevitable that residents who see unknown men with guns drawn and who batter down their front door will be "worried and agitated." As the court of appeals acknowledged, the entry of the officers would have "been a harrowing experience" for anyone in petitioners' circumstances. App. 28a.

In stark contrast to the Fourth Circuit's holding that such circumstances always authorize the detention of residents in handcuffs, this Court has held that such a restraint is reasonable only in "inherently dangerous situations" in order to "minimize[] the risk of harm to both officers and occupants." *Muehler*, 544 U.S. at 100. This search for financial records and the detention of two innocent women who obviously presented no threat could not be further apart from the search in *Muehler* for "deadly weapons" in the home of a known gang member. *Id.* at 95.

Finally, the conflict between the ruling below and this Court's decisions is most stark with respect to the Fourth Circuit's holding that the agents acted reasonably in continuing to detain petitioners in handcuffs for *four hours*, despite the agents' overwhelming numerical superiority and the absence of any objective indication at all that the use of

handcuffs remained necessary. The court of appeals found that detention reasonable merely because the agent in charge of the scene, *subjectively*, simply "wasn't comfortable" with removing the handcuffs, App. 33a, and only later "made a different decision," *id.* The agents' assessment changed not because of a determination that petitioners had once been a threat but no longer were, but instead "just a general sense of we're progressing with the warrant." App. 32a-33a.

The Fourth Circuit's ruling is utterly irreconcilable with this Court's decision in *Muehler*. In that case, this Court found it critical that the officers were faced with "no ordinary search," but instead critically were looking for deadly weapons in the home of a gang member and the detained individuals outnumbered the officers under their supervision. 544 U.S. at 100. Justice Kennedy took care to write separately to reiterate that it was essential to the Court's ruling sustaining the shorter detention in *Muehler* that "the detainees outnumber[ed] those supervising them." *Id.* at 103.

Here, by contrast, the Fourth Circuit upheld the continued detention of petitioners in handcuffs despite the absence of *any* objective justification. The court of appeals merely accepted the individual officer's subjective assessment – relating only to her "comfort[]" rather than the standards of the Constitution – as the measure of reasonableness. Notwithstanding that the district court record showed that the officers "were not subjectively concerned about the Unus residence being connected to terrorism-related activity, and that they did not

anticipate that the residence might house weapons or dangerous persons," App. 23a, the court of appeals went so far as to hold that "there is no genuine issue of material fact," such that respondents were entitled to summary judgment. App. 33a.

B. THE RULING BELOW SQUARELY CONFLICTS WITH THE PRECEDENT OF THE NINTH AND TENTH CIRCUITS.

Certiorari is also warranted to resolve the clear conflict between the precedent of the Fourth Circuit and contrary decisions of the Ninth and Tenth Circuits. The decision below extends prior Fourth Circuit precedent reading this Court's decisions in *Summers* and *Muehler* to broadly authorize officers to detain residents in handcuffs during searches for contraband. In *Mazuz v. Maryland*, 442 F.3d 217, 230 (4th Cir. 2006), that Court held in a case involving a search for contraband that detention is authorized whenever "a warrant authorizes a law enforcement officer to enter a premises to conduct a search," including with "the use of handcuffs."

The Fourth Circuit's ruling that the detention, initial handcuffing, and prolonged handcuffing of petitioners was reasonable under the Fourth Amendment conflicts with a line of Ninth Circuit decisions. In *Meredith v. Erath*, 342 F.3d 1057 (9th Cir. 2003), agents detained a resident for several hours in the course of executing a warrant for financial records. The Ninth Circuit explained that such a detention "must be 'carefully tailored' to the law enforcement interests that, according to the

Summers line of cases, justify detention while a search warrant is being executed." *Id.* at 1061-62. The court concluded that "[b]ecause handcuffing 'substantially aggravates the intrusiveness of a detention, it follows" that "[m]ore is required" to "justify a detention by handcuffing." *Id.* at 1063. Because the case came before the court on the understanding that the agents "had no reason to believe that the occupants were dangerous" or were "a serious impediment to the search or a threat," the court held that the agents were "not justified in detaining [the plaintiff] in handcuffs" during the search. *Id.*

Subsequently, in *Tekle v. United States*, 511 F.3d 839 (9th Cir. 2006), the court held that officers violated the Fourth Amendment by detaining an occupant in handcuffs for roughly twenty minutes while executing an arrest warrant. The court reaffirmed its ruling in *Meredith*, *supra*, as well as its prior holding that in executing a warrant "[p]olice do not . . . have unfettered authority to detain a building's occupants in any way they see fit." *Id.* at 848 (quoting *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006)). The Ninth Circuit reasoned that this Court's decision in *Muehler* authorizing the use of handcuffs turned on the "inherently dangerous" situation of a search for weapons. *Id.* at 849. While also noting that the plaintiff was a minor, the court held the detention unlawful because "law enforcement personnel vastly outnumbered [the plaintiff], more than twenty to one. It was apparent at the time that he was not the subject of the arrest warrant. Nor was there a

suspicion that there were deadly weapons and a gang member thought to be 'armed and dangerous' on the premises." *Id.* at 849-50. *See also Baldwin v. Placer County*, 418 F.3d 966, 970 (9th Cir. 2005) ("The governmental interests in using handcuffs are at their maximum when 'a warrant authorizes a search for weapons and a wanted gang member resides on the premise.' Conversely, governmental interests are at a minimum when the searches assert no belief that weapons will be found and no belief other than that the occupants of a house are a practicing dentist and his wife." (quoting *Muehler*, 544 U.S. at 100)).

The Ninth Circuit's established rule that officers may only handcuff occupants when executing a warrant that presents distinctly dangerous circumstances is illustrated by district court rulings in that circuit. In *Hepner v. Balaam*, No. 3:03-CV-0681-RAM, 2007 U.S. Dist. LEXIS 50495, at *9 (D. Nev. July 10, 2007), the court recognized that under the Ninth Circuit's ruling in *Erath*, as well as this Court's decision in *Muehler*, "where law enforcement have no reason to believe that the occupants were dangerous, use of handcuff[s] is not permitted." The court accordingly held that officers were not entitled to summary judgment on the occupants' Fourth Amendment claims, particularly given that "many law enforcement personnel were present during each search." *Id. See also Davage v. City of Eugene*, Civ. No. 04-6321-HO, 2007 U.S. Dist. LEXIS 50337, at *63-*64 (D. Or. July 6, 2007).

The Fourth Circuit's sweeping view of the reasonableness of such conduct equally with an uninterrupted line of precedent from the Tenth

Circuit. In *United States v. Ritchie*, 35 F.3d 1477 (10th Cir. 1994), officers detained the defendant for roughly ten minutes (not in handcuffs) while they searched his property for the proceeds of an armed robbery he was suspected of conducting just the day before. The Tenth Circuit held that, under *Summers*, "the 'police may always detain persons found at the premises named in a search warrant, *provided* (i) the warrant authorizes a 'search for contraband' and (ii) the persons detained are 'occupants.'" 35 F.3d at 1482 (quoting W. LaFave, Search & Seizure 4.9(e), at 309 (2d ed. 1987) (emphasis added and omitted)).

The Tenth Circuit subsequently reaffirmed the limits on police authority to detain residents in the wake of this Court's decision in *Muehler*. In *Denver Justice and Peace Committee v. City of Golden*, 405 F.3d 923, 929 (10th Cir. 2005), the Tenth Circuit explained that *Muehler* reaffirmed the principle that "police officers have a 'categorical' authority to ***detain*** persons found on premises subject to a lawful search warrant for 'contraband' materials" (emphasis in original). Thus, *Muehler* "reiterated the restriction of police officers' authority to detain occupants to the case 'when a neutral magistrate has determined police have probable cause to believe contraband exists.'" *Id.* at 931 (quoting *Muehler*, 544 U.S. at 99 n.2). The Tenth Circuit rejected the argument that *Muehler* broadly authorized officers to detain and frisk occupants during the course of any valid search. Although *Muehler* had deemed it reasonable to handcuff the occupants of the residence on the facts of that case, the Tenth Circuit recognized that this Court "stressed that these extreme measures were

justified by the circumstances in *Muehler*" and "articulated *narrow* grounds that permit police officers to detain individuals who are present during the execution of a search warrant, without running afoul of the Fourth Amendment." *Id.* at 931-32 (emphasis added).

Subsequently, the Tenth Circuit sustained the detention of individuals in handcuffs, but strictly limited its ruling to searches for contraband that present dangerous circumstances. "[T]he use of handcuffs to effectuate such a detention is proper when the search involves an inherent risk to officer safety." *United States v. Glover*, 211 Fed. Appx. 811, 813 (10th Cir. 2007) (citing *Muehler*, *supra*). "In this case, officers were authorized to search for both drugs and guns in a residence where drug-dealing had occurred and which was occupied by a twice-convicted drug dealer. They were confronted with multiple occupants. As in *Muehler*, the use of handcuffs in this situation was objectively reasonable because their use minimized the safety risk to officers and others." *Id.* Similarly, in *United States v. Castro-Portillo*, 211 Fed. Appx. 715, 722-23 (10th Cir. 2007), the Court held that handcuffing was authorized pursuant to a search under a "warrant for contraband and weapons," because "where a search warrant authorizes a search for weapons, an 'inherently dangerous situation arises.'" And *Wright v. City of St. Francis*, 95 Fed. Appx. 915, 925 (10th Cir. 2004), held that "police officers may apply handcuffs to those who are present during a search if they have 'good reason to fear violence or destruction

of evidence,'" though even in that circumstance the officers must specially justify a "prolonged" detention.

In contrast to the Fourth Circuit's ruling holding that respondents acted reasonably, the Ninth and Tenth Circuits would have held that petitioners stated a claim under the Fourth Amendment. In conflict with the Tenth Circuit, the court of appeals in this case held that it made no difference that the officers were executing a warrant seeking financial records, as opposed to contraband. In further conflict with both the Ninth and Tenth Circuits, the Fourth Circuit held that the initial and prolonged handcuffing of petitioners was justified despite the absence of any objectively reasonable reason to believe that the officers (who dramatically outnumbered petitioners) faced a dangerous situation. This Court's intervention is warranted to resolve the conflict.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CIRCUIT CONFLICT OVER WHETHER THE DISMISSAL OF AN FTCA CLAIM REQUIRES DISMISSAL OF SEPARATE CLAIMS AGAINST INDIVIDUAL FEDERAL OFFICERS IN THE SAME ACTION.

Petitioners' complaint asserts common law claims against the United States for assault and battery and false imprisonment under the Federal Tort Claims Act, as well as separate claims against individual federal agents under *Bivens v. Six Unknown Named Federal Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The Fourth Circuit held that the

district court properly dismissed the FTCA claims. It then held that dismissal of the separate and distinct *Bivens* claim alleging that the individual officers violated petitioners' right to religious freedom was required by the FTCA's judgment bar. App. 36a. That statute provides: "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

The Fourth Circuit's holding that the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit – and is not limited to the dismissal of FTCA claims in a separate action – is consistent with the precedent of three other circuits. *See Harris v. United States*, 422 F.3d 322, 336 (6th Cir. 2005); *Manning v. United States*, 546 F.3d 430, 438 (7th Cir. 2008); *Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d 840, 858 (10th Cir. 2005).

But those decisions conflict with the precedent of the Ninth Circuit. In *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992), as in this case, the plaintiff's complaint asserts claims under the FTCA and *Bivens*. The Ninth Circuit rejected the argument that dismissal of the FTCA claim triggered the judgment bar as to the individual *Bivens* claims in the same case. The court of appeals explained that the text of the judgment bar "fails to resolve the question of whether the bar applies to other claims raised in the same action," *id.* at 838, and concluded that the better reading of the statute as a whole was

that congress enacted Section 2676 to (i) "prevent multiple lawsuits on the same facts" and (ii) "preclude dual recovery against the government and its employees." *Id.* Therefore, because the plaintiff brought her *Bivens* claim and FTCA claim in the same lawsuit and there was "no threat of dual recovery . . . because Kreines did not prevail on her FTCA claim," *id.*, the court held that judgment on the FTCA claim did not preclude Kreines from recovering under *Bivens*. *See also Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (declining to extend *Kreines* to cases where a *Bivens* claim is brought *subsequent* to judgment on an FTCA claim, but reiterating that "an FTCA judgment in favor of the government [does] not bar the Bivens claim when the judgments are 'contemporaneous' and part of the same action."). District courts in the Ninth Circuit accordingly consistently allow plaintiffs to pursue a *Bivens* claim where the court has entered judgment on a contemporaneous FTCA claim. *See, e.g.*, *Kyei v. Beebe*, No. CV 01-1266-PA, 2005 WL 3050442, at *1-*2 (D. Or. Nov. 13, 2005) (holding that, under *Kreines*, plaintiff's *Bivens* claim was not barred by the dismissal of his contemporaneous FTCA claim); *Palma v. Dent*, No. C 06-6151 PJH, 2007 WL 2023517, at *5 (N.D. Cal. July 12, 2007) (same).

The Fourth Circuit was mistaken in citing *Arevalo v. Woods*, 811 F.2d 487, 490 (9th Cir. 1987), as supporting its position. *See* App. 35a. In *Arevalo*, the Ninth Circuit held that the judgment bar applied when the plaintiff *prevailed* in his FTCA claim against the United States. Subsequently, in *Kreines*, in which the plaintiff's FTCA claim was dismissed,

the Ninth Circuit specifically distinguished *Arevalo* on that basis. "In *Arevalo*, we barred a contemporaneous *Bivens* judgment against a federal employee because the plaintiff prevailed on his FTCA claim against the government. We thereby read § 2676 to preclude dual recovery against the government and its employees." 959 F.2d at 838. The Ninth Circuit held that the rationale of *Arevalo* did not apply when, as in this case, "[t]here is no threat of dual recovery." *Id.*

The conflict is mature and widely acknowledged. The Sixth and Seventh Circuits expressly rejected the Ninth Circuit's holding in *Kreines* and found that the judgment bar applies to contemporaneous *Bivens* claims regardless of who prevails on the FTCA claim. *See Harris v. United States*, 422 F.3d at 335-36; *Manning v. United States*, 546 F.3d at 437. Similarly, the Tenth Circuit has implicitly rejected *Kreines* by holding that the judgment bar applies regardless of who prevails on the FTCA claim. *See Estate of Trentadue ex rel. Aguilar v. United States*, 397 F.3d at 858.

This case perfectly illustrates the obvious error in the Fourth Circuit's construction of the FTCA's judgment bar. Petitioners' common law claims against the United States are entirely distinct from their First Amendment claims against the individual federal officers. The claims involve different facts and seek different relief. Petitioners *could not* have brought their religious discrimination claims against the United States under the FTCA. Yet, despite the absence of any concern that petitioners were

instituting successive litigation, the court of appeals held that the dismissal of petitioners' FTCA claims illogically barred them from pursuing a wholly different, meritorious claim that the federal officers violated petitioners' rights of religious freedom. Congress could not have intended that result.

In the Ninth Circuit, petitioners would have been entitled to pursue their separate claim under *Bivens* that the individual federal officers violated petitioners' rights by refusing to permit them to conduct their prayers free from interference. This Court should grant certiorari to resolve that conflict.

III. THE PROFOUND IMPORTANCE OF THE QUESTIONS PRESENTED CANNOT BE DISPUTED.

This Court should intervene to resolve the square conflicts between the ruling below and the precedents of this Court and other circuits. The first question presented is implicated during the execution of most of the hundreds (if not thousands) of search warrants that federal, state, and local officers execute every single day around the nation. It is essential that law enforcement authorities have clear guidance regarding whether they are permitted to detain individuals they encounter in executing warrants, under what conditions, and for what period of time. The present significant uncertainty regarding the reasonableness of such detention can only be resolved through a ruling by this Court elaborating on its prior decisions in *Summers* and *Muehler*.

This case is an ideal vehicle in which to decide the question presented. *Muehler*, in particular, involved the inherently dangerous situation of two officers outnumbered by detainees during the course of a search for deadly weapons in the home of a known gang member. The Fourth Circuit paid no heed to the careful limits of the Court's decision, and the separate concurrence of Justice Kennedy, but instead broadly authorized the hours-long handcuffed detention of innocent individuals who presented no threat. This case thus presents an excellent counterpoint to the dangerous circumstances faced by the agents in *Muehler*. The two cases in combination will provide law enforcement agencies with significant guidance on permissible police practices in these frequently recurring circumstances.

The importance of the second question presented is equally obvious. It is commonplace for civil rights plaintiffs to set forth in their complaints a claim against the United States under the FTCA, as well as separate claims against individual federal officers. Frequently, the FTCA claim is dismissed under one of the many defenses available to the government under the statute. The question whether the FTCA's judgment bar cuts off valid claims against the individual defendants necessarily arises in such a case. Given the Ninth Circuit's longstanding holding that the judgment bar does not apply in those recurring circumstances – dating to that Court's 1992 decision in *Kreines* – only this Court can bring needed uniformity to federal law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 3, 2009

APPENDIX

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2191

AYSHA NUDRAT UNUS AND HANAA UNUS, PLAINTIFFS-APPELLANTS

v.

DAVID KANE, SPECIAL AGENT, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL., DEFENDANTS-APPELLEES

Decided May 6, 2009

Before WILLIAMS Chief Judge, and TRAXLER and KING, Circuit Judges.

KING, Circuit Judge:

Plaintiffs Aysha and Hanaa Unus appeal from the judgment entered against them in the Eastern District of Virginia on constitutional and common law tort claims arising from an allegedly unlawful search of their northern Virginia home. They assert that a federal agent, David Kane, and another individual, Rita Katz, contravened the Fourth Amendment by conspiring to make misrepresentations of fact in order to obtain a search warrant for the Unus home. The plaintiffs also maintain that other federal agents

violated the First and Fourth Amendments and committed multiple common law torts in carrying out the search.[1] The plaintiffs challenge the dismissal of the claims against Kane and Katz; the dismissal of their constitutional claims against the federal agents who carried out the search; the summary judgment award to the United States on the tort claims; and the award of attorney's fees to Katz. As explained below, we reverse the fee award and affirm the balance of the judgment.

I.

A.

In March 2002, Iqbal Unus, Ph.D. ("Dr.Unus"), was employed by the Islamic Institute of Islamic Thought (the "IIIT"), a tax-exempt organization located in Herndon, Virginia. Dr. Unus, his wife, Aysha, and their two teenage daughters (including plaintiff Hanaa), lived in a two-story, single-family residence, also in Herndon.[2] All four members of the Unus household were United States citizens, and none had a criminal record.

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[1] In addition to Agent Kane and Katz, the plaintiffs have identified eleven federal agents as defendants: four Customs agents (Byron Braggs, Jennifer Crandall, Francisco Gerardo, and Roger Aarons); four Internal Revenue Service agents (Stasia McMahon, Antonio Gomez, Michael O'Hanlon, and Kenneth Oland); an Immigration and Naturalization Service agent (Camille Barnett); a Secret Service agent (Michael Zens); and a postal inspector (Elmer Mooring, Sr.).

[2] Hanaa Unus was eighteen years old at the time of the underlying events and is a co-plaintiff with her mother. The Unuses' other daughter was not present during the search and is not a plaintiff in these proceedings.

On March 12, 2002, as part of an extensive federal investigation of a group of entities (including the IIIT) and persons suspected of supporting international terrorism, Agent Kane submitted an affidavit (the "Affidavit") to a federal magistrate judge in support of applications to obtain search warrants for multiple locations, including a search warrant for the Unus residence (the "Warrant").[3] On March 13, 2002, the magistrate judge issued the Warrant and, on March 20, 2002, eleven federal agents and three local police officers executed it. The factual recitation made herein is predicated primarily upon the Affidavit, as well as allegations made by the plaintiffs in their initial complaint, filed on March 23, 2004 (the "Initial Complaint"), and a series of amended complaints filed on November 9, 2004 (the "First Amended Complaint"), August 29, 2005 (the "Second Amended Complaint"), and February 5, 2007 (the "Third Amended Complaint").[4] The predicate facts are also derived from discovery proceedings, including depositions of the plaintiffs and the federal agents involved in the search of the Unus residence. In the context of this appeal, the facts are spelled out in the light most favorable to the plaintiffs.

1.

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[3] The Affidavit and its related attachments are found at J.A. 54-190, and the Warrant is found at J.A. 2735-38. (Citations herein to "J.A. ___" refer to the Joint Appendix filed by the parties in this appeal.)

[4] The Initial Complaint is found at J.A. 37-49, the First Amended Complaint at J.A. 1038-60, the Second Amended Complaint at J.A. 1583-604, and the Third Amended Complaint at J.A. 1686-705.

After the September 11, 2001 terrorist attacks in New York, Washington, D.C., and Pennsylvania, the Treasury Department established "Operation Green Quest," a federal multi-agency task force assigned with investigating domestic financial support of international terrorism ("Green Quest"). In 2001, Green Quest began investigating "a group of individuals that [were] suspected of providing material support to terrorists, money laundering, and tax evasion through the use of a variety of related for-profit companies and ostensible charities under their control, most of which [were] located at 555 Grove Street, Herndon, Virginia." Affidavit 2. Green Quest suspected that a "web of companies and charities controlled by these individuals," led by "Middle Eastern nationals living in Northern Virginia," were conspiring to conduct terrorist-related activities in the United States. *Id.* at 2, 6. Although several of these organizations claimed to be educational and charitable in nature, Green Quest suspected that they were in fact merely "paper" organizations of an international terrorist network. *Id.* at 7.

The plaintiffs allege that Green Quest's investigation was informed by the research of Rita Katz, a self-professed expert on the tracking of terrorist organizations and the author of a book detailing her experiences as a researcher of terrorism-related activities in the United States. *See* Anonymous, *Terrorist Hunter* (2003).[5] Although Katz

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[5] In her appellate brief, Katz acknowledges that she is the author of *Terrorist Hunter*. *See* Br. of Appellee Katz 8.

has never been a federal agent, she has consulted with the federal government, providing several federal agencies with information about Islamic organizations operating in the United States.[6] The plaintiffs assert that Katz "espouses a belief that if one is a Muslim, one is a terrorist by virtue of religion," and that she imparted this belief on the federal agents that she trained. First Amended Complaint 5. Green Quest, according to the plaintiffs, latched on to Katz's theory that a widespread terrorist network was operating out of an office building at 555 Grove Street in Herndon, Virginia, and her belief that "all roads of terrorist funding and ideology in America lead to 555." *Id.* at 4 (internal quotation marks omitted). Thus, Katz persuaded Agent Kane, a Green Quest member, to seek search warrants of 555 Grove Street and several related locations, despite having been advised by federal prosecutors that there was no probable cause to search. The plaintiffs observe that Katz referred to herself in her book as Green Quest's "stealthy guiding beam," and that the Safa Group investigation was "[her] investigation, [her] baby, [her] project." *Id.* at 18 (internal quotation marks omitted).

2.

On March 12, 2002-at Katz's urging-Agent Kane submitted the Affidavit to a magistrate judge in support of search warrant applications for several

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[6] According to the plaintiffs, Katz has been paid over $272,000 for work performed for the United States government.

businesses and residences. Through ninety-nine pages and fifty-two exhibits (after redactions), the Affidavit explained that the federal government had been investigating several suspect entities and individuals, and "[f]or ease of reference," the Affidavit labeled this "web of companies and charities ... as the 'Safa Group.' " Affidavit 2 (emphasis omitted). The Affidavit further explained that a federal investigation into the Safa Group that had been started in the late-1990s had revealed:

> a convoluted web of multiple transactions between related corporations and charities that made it virtually impossible for federal investigators to ascertain where the money that finally left the web of the Safa Group ultimately went. Indeed, the current investigation has traced millions of dollars through layers of related companies and to charities in the Isle of Man-from which point the trail cannot be practically followed.

Id. at 7-8 (emphasis omitted).

By the Affidavit, Kane asserted that "individuals associated with the Safa Group [were] using the various affiliated charities and companies under their control to transfer money in convoluted transactions through a network of inter-related organizations designed to prevent the United States from tracking the ultimate recipients." *Id.* at 8 (emphasis omitted).

After describing terrorist-financing techniques and federal financial-reporting and tax laws, the Affidavit listed several individuals and entities suspected of being involved with international

terrorism, explaining their connection to the Safa Group. "Although the Safa Group consists of over 100 interwoven organizations," Agent Kane stated, "the investigation has focused on approximately 20 core organizations, and their associated corporate officers and directors." Affidavit 41 (emphasis omitted). Moreover, the Affidavit specified that:

> IRS tax files and corporation documents disclose that 555 Grove Street, 500 Grove Street, and associated addresses in Herndon are the corporate offices of record for over 100 active and defunct corporations, partnerships and tax exempt charitable organizations that are woven together by common officers and directors. According to the Virginia Secretary of State, approximately 40 active corporations claim their offices to be located at 555 Grove Street, alone.

Id. at 43.

In particular, the Affidavit explained that IRS Forms 990 and additional tax-related documents for "seven tax-exempt Safa Group organizations" revealed that many of the organizations had overlapping leadership comprised of persons suspected of supporting terrorism. Affidavit 43 (emphasis omitted). Labeling these organizations as the "Safa Charities," the Affidavit stated that all seven of them were located in Herndon, with five sharing the same 555 Grove Street address. *Id.* "Analysis of the above returns and available supporting documentation," the Affidavit explained, "disclosed a series of transactions between related companies that, when examined in their entirety, evidences a conspiracy" among several individuals,

"known and unknown, to route money through hidden paths to terrorists, and to defraud the United States." *Id.* at 44. Furthermore, the Affidavit explained that "the pattern of grants and allocations made does not demonstrate the Safa Charities are operating for an exempt purpose," an assertion that Kane supported with extensive financial data. *Id.* at 45 (emphasis omitted). Instead, "[t]he vast majority of funds" leaving the Safa Charities, Kane maintained, were transferred to two purportedly charitable trusts located on the Isle of Man, both of which had officers or trustees who were connected to the Safa Group. *Id.* at 47. Kane stated that these transactions were intended to mask the true nature of the transactions-financing terrorism.

Pertinent to these proceedings, the Affidavit listed Dr. Unus as the director of one Safa Group organization (the Child Development Foundation), an advisor to two others (the Sterling Charitable Gift Fund and the Sterling Management Group), as well as the "administrative and billing contact for web sites" for two more (the IIIT and the FIQH Council of North America). Affidavit 38. Because of Dr. Unus's positions in these organizations, Agent Kane believed that Dr. Unus had access to Safa Group financial records. Furthermore, Kane stated that a "trash run"-which the plaintiffs allege was conducted by Katz-had recovered trash disposed of at the Unus residence, and that "[v]arious documents were found, indicating that Unus maintains [Safa Group financial] records at his house." *Id.* at 96-97 (emphasis omitted). Based on such information, Kane swore there was "probable cause to believe that evidence of [federal law] violations" would be found at

the Unus residence in the form of Safa Group financial records. *Id.* at 98.

3.

Predicated upon the information submitted in the Affidavit, the magistrate judge found that probable cause existed and issued the Warrant. The Warrant targeted twenty separate categories of documents and things, focusing the search of the Unus residence on evidence of money laundering, tax evasion, and material support of terrorism.

On March 20, 2002, beginning at approximately 10:30 a.m., eleven federal agents, along with three uniformed Fairfax County police officers, executed the Warrant, simultaneously with the execution of other search warrants issued by the magistrate judge in connection with the Green Quest investigation.[7] Agent Oland initiated the search of the Unus residence, pounding on the front door and ordering the occupants to open it. At that time, plaintiff Aysha Unus (Dr. Unus's wife) was in the rear of the home, in the living room, and plaintiff Hanaa Unus (one of the Unuses' daughters), was upstairs, asleep in her bedroom. Aysha heard the officers pounding on the front door, moved a few feet, and again heard the pounding, this time accompanied by a voice commanding her to open the door. When she got within about fifteen feet of the front door, she saw a gun through a side window. She then inched closer to the door, getting within about ten feet of it.

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[7] The three uniformed Fairfax County police officers are not named as defendants here.

Frightened and confused, Aysha Unus began "screaming for [Hanaa]," J.A. 5429, and as Hanaa came downstairs, Aysha retreated to the rear of the Unus residence, towards a sliding glass door that opened to the backyard. Hanaa then joined her mother on the first floor of the house, and they went into the living room and called 911. At this time, the officers broke through the front door with a battering ram. Agent Aarons entered the Unus residence with his firearm drawn and moved to the rear of the house. As Hanaa described it, "You could hear [the agents] break something, the wood or whatever, and they just came storming in. It was a bunch of them, and one of them had a gun ... pointed at me, and he was yelling at me to drop the phone and put my hands up." *Id.* at 5436. Aarons then instructed Hanaa to sit on the floor, handcuffed her hands behind her back, and placed her in a chair in the living room. As this occurred, Agent Oland handcuffed Aysha with her hands behind her, and placed her on a sofa in the living room. The officers then began searching the Unus residence in accordance with the Warrant. After an initial sweep of the house, an agent showed a copy of the Warrant to Aysha.

During the search, Aysha and Hanaa Unus remained handcuffed in the family room of their residence for nearly four hours. During this time, the agents permitted the women to use the restroom upon request, and they allowed Aysha to self-administer her diabetes medication. Around 2:00 p.m., the women informed the officers that they were obliged to perform their afternoon prayers and a ritual cleansing, in accordance with their Muslim faith. An agent acceded to this request and removed

their handcuffs, allowing them to perform their prayers. Despite being allowed to pray, the plaintiffs were not allowed to do so outside the presence of the male agents, nor were they allowed to wear head scarves or cover their hands while the male agents were present, or while being photographed. After they prayed, the two women were no longer handcuffed, but remained confined to the living room for the duration of the search. At the conclusion of the search, the agents seized two computers and six boxes of documents from the Unus residence, leaving with the plaintiffs a copy of the Warrant and a written inventory of the items seized.[8]

B.

1.

On March 23, 2004, Aysha and Hanaa Unus, along with Dr. Unus, filed the Initial Complaint against Agent Kane, Katz, and "Unknown Named Federal Agents."[9] The Initial Complaint alleged five separate claims, all of which implicated the Unknown Named Federal Agents, and three of which implicated both Kane and Katz. These claims were as follows:

- Conspiracy to violate the plaintiffs' First, Fourth, Fifth, and Fourteenth Amendment

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[8] According to the plaintiffs, "[m]ost of the documents taken from the Unus home were returned." Br. of Appellants 18. Furthermore, the Green Quest investigation did not result in any arrests or indictments.

[9] Although Dr. Unus was named as a plaintiff in the Initial Complaint, he was not a plaintiff in the subsequent complaints and is not a party to this appeal.

rights (the "Bivens conspiracy claim").10 All defendants conspired "to fabricate evidence in support of a search warrant to search the Plaintiffs' home." Initial Complaint 9.

• Violation of the plaintiffs' First, Fourth, Fifth, and Fourteenth Amendment rights (the "substantive Bivens claim"). All defendants violated the plaintiffs' constitutional rights by making material misrepresentations of fact "to support the search of Plaintiffs' home after they knew that there was no probable cause for same," as well as in unreasonably executing the Warrant. Initial Complaint 10.

• Conspiracy to interfere with the plaintiffs' civil rights (the "§ 1985 claim"). All defendants engaged in a conspiracy, "motivated by a specific class-based, invidiously discriminatory animus to deprive Plaintiffs of" equal protection of the law. Initial Complaint 11.

• Assault and battery. The Unknown Named Federal Agents assaulted Aysha and Hanaa Unus "when they barged into their home with guns in their faces and yelled at them to drop the telephone and put their hands up," and battered the women by unreasonably

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[10] The plaintiffs sued the defendants, in part, directly under the Constitution, pursuant to the Supreme Court's 1971 decision in *Bivens v. Six Unknown Named Fed. Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (authorizing award of money damages against individual federal officers for violations of Fourth Amendment).

handcuffing them for four hours. Initial Complaint 11-12.

- False imprisonment. The Unknown Named Federal Agents falsely imprisoned Aysha and Hanaa Unus "by directly restraining them of their physical liberty without adequate legal justification." Initial Complaint 11.

The Initial Complaint sought both compensatory and punitive damages from the defendants, as well as attorney's fees under 42 U.S.C. § 1988.

On September 13, 2004, Agent Kane and Katz separately moved under Federal Rule of Civil Procedure 12(b)(6) for dismissal of the Initial Complaint. On October 29, 2004, the district court dismissed the claims against Kane and Katz without prejudice. From the bench, the court explained that the Initial Complaint failed to identify "the specific allegedly false statements that are in the affidavit and a description of why that falsity would be material to the ultimate finding of probable cause." J.A. 1032.

2.

On November 9, 2004, Aysha and Hanaa Unus filed the First Amended Complaint, again naming Agent Kane, Katz, and "Unknown Named Federal Agents" as defendants, and once again pleading the claims made in the Initial Complaint. In an effort to allege their claims with greater specificity, the plaintiffs added additional and more particularized factual allegations.

On January 11, 2005, in response to Rule 12(b)(6) motions filed by Agent Kane and Katz, the district court dismissed the First Amended Complaint, as to

all defendants, with prejudice. In so ruling, the court explained from the bench that it had "found by reading the entire affidavit," as well as "by looking at the specific allegations ... in the amended complaint," that the plaintiffs had "not sufficiently alleged" that Kane and Katz had made material misrepresentations of fact in the Affidavit. J.A. 1161. The court observed that, in light of "the totality of the information provided [in the Affidavit] and the multiple examples of layering and other types of highly suspicious financial transactions among and between these various groups ... [,] this affidavit establishes probable cause and did for this particular search." *Id.* at 1150.

On February 10, 2005, the plaintiffs moved the district court to reconsider its dismissal of the First Amended Complaint. On March 11, 2005, the court denied reconsideration with respect to Agent Kane and Katz, but granted such relief on the claims against the Unknown Named Federal Agents. *See Unus v. Kane,* No. 1:04-cv-00312 (E.D.Va. Mar. 11, 2005) (the "Reconsideration Order"). [11] Kane was entitled to qualified immunity, the court explained, because "none of the alleged misrepresentations described in the Amended Complaint constitutes a material false statement, as would be required to deny Kane qualified immunity from the claims against him." *Id.* at 3. Furthermore, the court denied reconsideration of the claims against Katz, explaining that, because "the affidavit [was] sufficient to support the search and not premised on

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[11] The Reconsideration Order is found at J.A. 1185-89.

material misrepresentations, defendant Katz, who supplied information to Kane for the affidavit but is not a government employee, also cannot be liable for the claims stated in the Amended Complaint." *Id.* The court vacated, however, that aspect of its January 11, 2005 order dismissing the claims in the First Amended Complaint against the Unknown Named Federal Agents, granting the plaintiffs a period of forty-five days to conduct discovery on the execution of the search of the Unus residence, in order to permit them to identify the Unknown Named Federal Agents and properly serve them.[12]

3.

On April 28, 2005, the district court ruled, in response to a motion filed by Katz, that the provisions of 42 U.S.C. § 1988 authorized her to recover attorney's fees for successfully defending the *Bivens* conspiracy and § 1985 claims in the First Amended Complaint. *See Unus v. Kane,* No. 1:04-cv-00312 (E.D.Va. Apr. 28, 2005) (the "Fee Order").[13] Although attorney's fees are not available in a *Bivens* action, the court observed that they are available for the successful defense of a § 1985 claim. In these proceedings, the court ruled, the *Bivens* claims and the § 1985 claim "arose from the same nucleus of operative facts." *Id.* at 2. Thus, the court explained,

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[12] The district court also observed, in a footnote to the Reconsideration Order, that "[a]ny Second Amended Complaint may not include claims against defendants Kane and Katz, against whom this action is dismissed with prejudice." Reconsideration Order 5 n. 5.

[13] The Fee Order is found at J.A. 1422-27.

"Katz defended against two closely related constitutional claims that were both dismissed based upon the same finding that no constitutional violation occurred." *Id.* at 3. Because of the interrelationship of the claims made against Katz, the court concluded that § 1988 authorized an attorney's fee award to her for the time spent defending the *Bivens* conspiracy and § 1985 claims, as alleged in the First Amended Complaint.

The district court then assessed whether such an award was appropriate under the circumstances. "To merit a fee award under § 1988," the court observed, "a prevailing defendant must demonstrate that the claims against her were 'frivolous, unreasonable or groundless' or that 'the plaintiff continued to litigate after [the claims] clearly became so.' " Fee Order 3 (quoting *Hutchinson v. Staton,* 994 F.2d 1076, 1080 (4th Cir. 1993)). Here, the court explained, "although plaintiffs may not have been aware when they filed the [Initial] Complaint that their claims were groundless, they should have been so aware before they filed the [First] Amended Complaint." *Id.* at 5. Thus, the court concluded, Katz was entitled to an award of fees in connection with her defense of the First Amended Complaint. As a result, on July 25, 2005, the court awarded the sum of $41,105.70-$36,856.20 for attorney's fees and $4,249.50 for costs-which it calculated as the fees and costs incurred by Katz after the filing of the First Amended Complaint.[14]

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[14] In requesting an award of costs, Katz relied on Federal Rule of Civil Procedure 54(d)(1), which provides, in pertinent part,

4.

On August 29, 2005, the plaintiffs filed their Second Amended Complaint, replacing the designation of "Unknown Named Federal Agents" with the identities of the eleven federal agents who had conducted the search of the Unus residence (the "federal agent defendants"). *See supra* note 1. Naming the federal agent defendants only, the Second Amended Complaint alleged five causes of action:

> • *Violation of the plaintiffs' First and Fourth Amendment rights* (respectively, the "First Amendment *Bivens* subclaim" and the "Fourth Amendment *Bivens* subclaim"). The federal agent defendants violated the plaintiffs' First Amendment rights by preventing the plaintiffs from freely exercising their religion by not allowing them to wear their headscarves while being photographed, and by not allowing them to pray outside the presence of the male agents. The federal agent defendants contravened the plaintiffs' Fourth Amendment rights by using "unconstitutional and excessive force in effectuating the search." Second Amended Complaint 17.
>
> • *Assault and battery.* The federal agent defendants assaulted and battered the

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that "costs-other than attorney's fees-should be allowed to the prevailing party." In this appeal, the plaintiffs do not challenge the award of costs to Katz.

plaintiffs when they "descended upon plaintiffs' home *en masse* with their guns drawn, failed to identify themselves or show a warrant, broke down the plaintiffs' front door, forcibly entered the premises and handcuffed Plaintiffs." Second Amended Complaint 20.

- *False imprisonment.* The federal agent defendants restrained the plaintiffs "without legal justification when they handcuffed plaintiffs, and held them handcuffed in their family room without allowing them to leave for over four hours while they searched plaintiffs' home." Second Amended Complaint 19.

- *Aiding and abetting.* The federal agent defendants each "knew of, substantially assisted and aided and abetted each of the other Federal Agents violating" the plaintiffs' constitutional rights, as well as assaulting, battering, and falsely imprisoning the plaintiffs. Second Amended Complaint 21.

- *Conspiracy.* The federal agent defendants each "entered into an agreement and conspired with each other to violate" the plaintiffs' constitutional rights, as well as to assault, batter, and falsely imprison the plaintiffs. Second Amended Complaint 21.

On December 9, 2005, the United States substituted itself as a party defendant in the Second Amended Complaint-in the place and stead of the federal agent defendants-for the assault-and-battery and false imprisonment claims, pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2679(d)(1) (the

"FTCA").[15] The United States then moved to dismiss each of those claims, asserting that the court lacked jurisdiction over them because the plaintiffs had failed to file the administrative claims mandated under the FTCA.[16]

On February 3, 2006, the district court granted the motion of the United States to dismiss the assault-and-battery and false imprisonment claims without prejudice, authorizing the plaintiffs a period of sixty days to file the appropriate administrative claims. The court also stayed the First Amendment *Bivens* subclaim for a period of eight months, pending the outcome of the administrative claims. The court then dismissed with prejudice the Fourth Amendment *Bivens* sub-claim, along with the aiding-and-abetting and conspiracy claims. It ruled that the federal agent defendants were entitled to qualified immunity on the Fourth Amendment *Bivens* sub-claim, and that there was no legal basis upon which either the aiding-and-abetting claim or the conspiracy claim could proceed.

5.

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[15] The FTCA mandates that, "[u]pon certification by the Attorney General that the defendant employee [of the United States] was acting within the scope of his office or employment at the time of the incident out of which the claim arose, ... the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1).

[16] In order for a federal court to exercise jurisdiction over a tort claim against the United States, the FTCA requires that the claim be "first presented ... to the appropriate Federal agency" and that it be "finally denied" by the agency. 28 U.S.C. § 2675(a).

On February 5, 2007, the plaintiffs filed their Third Amended Complaint, repleading the First Amendment *Bivens* subclaim against the federal agent defendants, along with the assault-and-battery and false imprisonment claims, as well as a new trespass claim, against the United States.[17] On March 12, 2007, the federal agent defendants and the United States responded to the Third Amended Complaint with motions to dismiss filed pursuant to Rule 12(b)(6).

By order of May 11, 2007, the district court dismissed with prejudice the First Amendment *Bivens* subclaim against the federal agent defendants, ruling that this subclaim was barred by the applicable statute of limitations, in that the Second Amended Complaint did not relate back to the filing of the Initial Complaint. The court denied, however, the motion of the United States to dismiss the assault-and-battery, false imprisonment, and trespass claims.

On September 12, 2007, the plaintiffs requested that the court reconsider its dismissal of the First Amendment *Bivens* subclaim, in light of our decision in *Goodman v. Praxair*, 494 F.3d 458 (4th Cir. 2007) (en banc) (addressing doctrine of "relation back" concerning pleadings), which had been rendered on July 25, 2007. In response, the court ordered

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[17] The trespass claim, first made in the Third Amended Complaint, alleged that the federal agent defendants' decision to break down the plaintiffs' front door and enter their residence constituted "an unauthorized entry onto Plaintiffs' property." Third Amended Complaint 19.

additional briefing on the relation-back issue.

Finally, on November 2, 2007, the district court granted summary judgment to the United States on the assault-and-battery, false imprisonment, and trespass claims. The court explained that there was no genuine issue of material fact with regard to those claims-the agents acted reasonably under the circumstances known to them at the time of their conduct, and summary judgment was therefore appropriate. Then, notwithstanding its earlier order for additional briefing, the court dismissed the First Amendment *Bivens* subclaim against the federal agent defendants as moot.

Their various claims having been either dismissed or subject to adverse summary judgment awards, and final judgment having been entered by the district court on November 2, 2007, the plaintiffs timely noted this appeal. We possess jurisdiction pursuant to 28 U.S.C. § 1291.

II.

An award of summary judgment is reviewed de novo. *See PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 217 (4th Cir. 2009). Summary judgment is appropriate only where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). In disposing of a summary judgment request, a district court must view the evidence in the light most favorable to the non-moving party. *See Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003).

We also review de novo a district court's dismissal of a claim under Federal Rule of Civil

Procedure 12(b)(6), examining whether the plaintiffs' pleadings have adequately stated facts, which, if proven to be true, would entitle them to relief. *See Duckworth v. State Admin. Bd. of Election Laws,* 332 F.3d 769, 772 (4th Cir. 2003). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must allege enough facts " 'to raise a right to relief above the speculative level' and must provide 'enough facts to state a claim to relief that is plausible on its face.' " *Robinson v. Am. Honda Motor Co., Inc.,* 551 F.3d 218, 222 (4th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). Additionally, a district court's dismissal on qualified immunity grounds is reviewed de novo. *See Trulock v. Freeh,* 275 F.3d 391, 399 (4th Cir. 2001).

We review de novo a district court's conclusion that an attorney's fee award may appropriately be made. *See Bass v. E.I. DuPont de Nemours & Co.,* 324 F.3d 761, 766 (4th Cir. 2003). The court's decision to award such fees, however, is reviewed for abuse of discretion. *See Brodziak v. Runyon,* 145 F.3d 194, 196 (4th Cir. 1998).

III.

The plaintiffs present five separate contentions of error on appeal. First, they maintain that the district court erred in entering summary judgment in favor of the United States on the assault-and-battery and false imprisonment claims. Second, the plaintiffs challenge the court's dismissal of the First and Fourth Amendment *Bivens* subclaims against the federal agent defendants. Third, the plaintiffs maintain that the court improperly concluded that Agent Kane is entitled to qualified immunity on the substantive *Bivens* claim against him. Fourth, the

plaintiffs assert that the court erroneously dismissed the *Bivens* conspiracy and § 1985 claims against Katz. And finally, they contend that the court erred in awarding attorney's fees to Katz. We assess each of these contentions in turn.[18]

A.

We first address the plaintiffs' assertion that the district court erroneously entered summary judgment in favor of the United States on the assault-and-battery and false imprisonment claims. In that respect, the court explained from the bench that the federal agent defendants had acted "reasonabl[ly] under the circumstances known to the officers at the time they took their action." J.A. 5720. The plaintiffs contend that the court erred by failing to properly view the facts and draw all inferences in their favor, as it was obliged to do in considering a summary judgment motion. In particular, they assert that the court failed to consider statements by certain of the federal agent defendants indicating that, at the time of the search, they were not subjectively concerned about the Unus residence being connected to terrorism-related activity, and that they did not anticipate that the residence might house weapons or dangerous persons. *See, e.g.*, J.A. 2927-29, 3190-92, 4315-16, 4348-50, 4593-94, 4809-10. Thus, the

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[18] On appeal, the plaintiffs do not challenge the district court's disposition of the trespass, aiding-and-abetting, and conspiracy claims against the United States; the dismissal of the *Bivens* conspiracy and § 1985 claims against Agent Kane; the dismissal of the substantive *Bivens* claim against Katz; or the award of costs to Katz.

plaintiffs maintain, the federal agent defendants' use of force in executing the Warrant was unreasonable, and summary judgment was inappropriate. As explained below, we disagree with this contention and thus affirm the summary judgment award on the assault-and-battery and false imprisonment claims.

To properly review the summary judgment award on the assault-and-battery and false imprisonment claims, we must first identify the legal principles governing their adjudication. As previously explained, on December 9, 2005, the United States substituted itself for the federal agent defendants as the proper defendant on the common law tort claims. Upon that substitution, the common law tort claims against the federal agent defendants became claims against the United States.[19] The FTCA does not itself provide for a substantive cause of action. Rather, in assessing FTCA claims, we apply the substantive law of the state where the alleged tort took place: in this case, the law of the Commonwealth of Virginia. *See* 28 U.S.C. § 1346(b); *Medina v. United States,* 259 F.3d 220, 223 (4th Cir. 2001).

Having identified the controlling body of law, we look to Virginia's definitions of assault, battery, and false imprisonment. In Virginia, a false imprisonment is " 'the direct restraint by one person of the physical liberty of another without adequate legal justification.' " *Figg v. Schroeder,* 312 F.3d 625, 637 (4th Cir. 2002) (quoting *Jordan v. Shands,* 255

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[19] The plaintiffs do not challenge the propriety of the substitution of the United States as the defendant on the FTCA claims.

Va. 492, 500 S.E.2d 215, 218 (1998)). Virginia defines a battery as "an unwanted touching which is neither consented to, excused, nor justified," and an assault as "an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." *Koffman v. Garnett,* 265 Va. 12, 574 S.E.2d 258, 261 (2003). A legal justification for the act being complained of will defeat an assault or battery claim. *See id.* Importantly, Virginia recognizes that police officers are legally justified in using reasonable force to execute their lawful duties. *See, e.g., Pike v. Eubank,* 197 Va. 692 (1956). Thus, in assessing the summary judgment award, we must assess whether the federal agent defendants acted reasonably under Virginia law.

In Virginia, "[a] police officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia." *Lewis v. Commonwealth,* 493 S.E.2d 397, 399 (1997) (internal quotation marks omitted). A determination of reasonableness requires the balancing of "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Young v. Prince George's County, Md.,* 355 F.3d 751, 757 (4th Cir. 2004) (internal quotation marks omitted). Importantly, an officer's conduct must be assessed for *objective* reasonableness; his *subjective* motivations have no bearing on our inquiry. *See id.* at 758-59. This "calculus of reasonableness," we have

carefully explained, "must embody allowances for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain and rapidly evolving-about the amount of force that is necessary in a particular situation." *Park v. Shiflett,* 250 F.3d 843, 853 (4th Cir. 2001). Finally, in applying these principles, the reasonableness of an officer's actions in connection with the execution of a search warrant must be assessed in light of the circumstances that existed at the time. *See id.*

1.

We begin our analysis with the assault claim, being mindful that Virginia has recognized that "the safety of the officer when conducting his duties is of paramount importance." *Harris v. Commonwealth,* 400 S.E.2d 191, 194 (1991) (internal quotation marks omitted). In this claim, the plaintiffs assert that the federal agent defendants assaulted them by forcing entry into the Unus residence with a battering ram, and also by pointing firearms at them during the initial entry into the residence.

First, the forced entry by the federal agent defendants into the Unus residence was reasonable and did not constitute an assault. In Virginia, "[p]rior to forcing entry into a dwelling, police must: (1) knock; (2) identify themselves as police officers; (3) indicate the reason for their presence; and (4) wait a reasonable period of time for the occupants to answer the door." *Lewis,* 493 S.E.2d at 399 (internal quotation marks omitted). We have explained that "the time which must elapse after knocking and announcing [the officer's] identity and purpose before breaking and entering varies with the exigencies of each case." *United States v. Ward,* 171 F.3d 188, 193-

94 (4th Cir. 1999) (internal quotation marks omitted). In executing the Warrant, Agent Oland acknowledged that he "pounded" on the door, identified himself as the "police," announced that he had a warrant, and ordered the occupants of the residence to "open the door." J.A. 2944-45.[20] Oland saw Aysha Unus through the window next to the front door and, after repeating his command to open the door, he watched her run "down the hallway to the back of the house." *Id.* at 2948. This period of time-though less than a minute-constituted, in these circumstances, a reasonable wait by the agents.[21] In assessing reasonableness, we see the federal agent defendants as entitled to consider the failure of the plaintiffs to open the door as a refusal to permit entry in accordance with the Warrant, and they were thus justified in forcing entry into the residence. *Cf. Mensh v. Dyer,* 956 F.2d 36, 40 (4th Cir. 1992) (recognizing that forced entry was justified after officers heard "the sound of running feet").

Second, the pointing of firearms at the plaintiffs

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[20] In addition to Agent Oland's verbal announcement identifying himself and the other agents as the authorities, visual indicators identified them as such. The federal agent defendants wore badges around their necks, and the three Fairfax County police officers were in uniform.

[21] The time period between Agent Oland's initial knock and the forced entry into the Unus residence was sufficient for Aysha Unus to get up from the couch, place her breakfast bowl on the table, slowly walk toward the front door, run to the rear of the residence, call out to her daughter Hanaa (who was asleep upstairs), and then for Hanaa to come downstairs, join her mother, and call 911.

upon entry into the Unus residence was reasonable under the circumstances. Upon the failure of the occupants to permit the officers to enter in accordance with the Warrant, the officers were entitled to forcibly enter, where they immediately encountered two persons unknown to them, one of whom was on a telephone. In that circumstance, the officers were reasonably entitled to believe that the drawing of weapons was necessary in order to gain control of a fluid situation and ensure the safety of all involved. *See Michigan v. Summers,* 452 U.S. 692, 702-03 (1981) ("The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation."). Indeed, the record reflects that the federal agent defendants drew their weapons only long enough to ensure their safety and control of the situation-once the plaintiffs complied with the agents' directives, the weapons were holstered.

To be sure, the federal agent defendants' forced entry into the Unus residence must have been a harrowing experience for the plaintiffs. The federal agent defendants were entitled, however, to exercise lawful force in entering the Unus residence, and they thus acted reasonably in drawing and pointing their weapons. We thus affirm the district court's summary judgment award on the assault claim in favor of the United States.

2.

We next assess the plaintiffs' false imprisonment and battery claims, which they contend should be allowed to proceed in the district court. The plaintiffs contend that the federal agent defendants battered them by handcuffing them upon entry into the Unus

residence, and that the agents falsely imprisoned them by detaining them in handcuffs in the living room for several hours while the Warrant was executed.

It has been consistently recognized that the Fourth Amendment protects a citizen's right to be free from unreasonable seizures. *See Valladares v. Cordero,* 552 F.3d 384, 388 (4th Cir. 2009). In *Michigan v. Summers,* however, the Supreme Court explained that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." 452 U.S. at 705. Moreover, in *Muehler v. Mena,* the Court observed that "[i]nherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention." 544 U.S. 93, 98-99 (2005). In his concurring opinion in *Mena,* Justice Kennedy further explained that "[t]he use of handcuffs is the use of force," and that the employment of "such force must be objectively reasonable under the circumstances." *Id.* at 103, (Kennedy, J. concurring) (citing *Graham v. Connor,* 490 U.S. 386 (1989)).[22]

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[22] The plaintiffs seek to distinguish the *Summers* and *Mena* decisions from this case on the ground that the detentions in those cases were permissible because the operative search warrants commanded a search for contraband, whereas the Warrant focused solely on financial documents. We see this as a distinction without a difference, however, as the rationale underlying *Summers* and *Mena* applies equally to situations where agents are seeking evidence of federal crimes. *See United States v. Photogrammetric Data Serv., Inc.,* 259 F.3d 229, 239

In *Mena,* the Court reviewed the reasonableness of the two to three hour detention of a woman in handcuffs in her garage-along with three other occupants of her house-while police officers conducted a warranted search of the house for weapons and a wanted gang member. *See* 544 U.S. at 96. Examining the circumstances surrounding that assertedly unlawful detention, the Court concluded that the officers' use of handcuffs for the duration of the search was reasonable, "because the governmental interests outweigh[ed] the marginal intrusion." *Id.* at 99. Indeed, Chief Justice Rehnquist carefully explained that the length of a detention in handcuffs-even though somewhat lengthy-must be balanced against "the government's continuing safety interest." *Id.* at 100. The fact that the officers were searching a "gang house for dangerous weapons" justified such a detention, even though the plaintiff was not herself a target of the search. *Id.*

In this case, viewing the facts surrounding the false imprisonment claim in the light most favorable to the plaintiffs, the plaintiffs were unquestionably "seized," as they were confined to their living room for several hours (mostly in handcuffs) while their residence was being searched. Their seizure was not, however, unreasonable. The federal agent defendants were executing a facially valid search warrant for the Unus residence, and the plaintiffs were-unfortunately for them-occupants of the residence at

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(4th Cir. 2001) (recognizing reasonableness of detention of occupants during search for records), *abrogated on other grounds by Crawford v. Washington,* 541 U.S. 36 (2004).

the time of the search. Under the *Summers* precedent, it was reasonable for the federal agent defendants to detain the plaintiffs during the search. *See Mena,* 544 U.S. at 98 ("Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed ... and she was an occupant....").

Notwithstanding the reasonableness of the plaintiffs' detention during the search, however, there remains an issue of whether the manner of their detention-specifically, the handcuffing-was unreasonable. *See Mena,* 544 U.S. at 99 (explaining that applying handcuffs constitutes "separate intrusion"). In order for a handcuffing such as this to be reasonable, "the governmental interests" being invoked must have "outweigh[ed] the marginal intrusion" on the plaintiffs. *Id.* at 99-100. A determination of the permissible time during which an occupant of a searched premises may be detained in handcuffs requires the authorities to objectively balance the interests of safety and orderly execution of a warrant against the occupants' interests in not being restrained in handcuffs.

Put simply, the federal agent defendants' decision to initially handcuff the plaintiffs upon entry into the Unus residence was reasonable. Although they were searching for financial documents only-and not for either weapons or persons-a reasonable officer would have had legitimate safety concerns under these circumstances. The agents were executing a duly issued search warrant-one of several related warrants being executed that day-at a residence believed to contain evidence of money laundering by entities suspected of assisting international

terrorism. Viewed objectively, the agents did not know whether they would be confronted by resistance. And, upon entry into the Unus residence, the agents encountered hectic conditions. Agent McMahon, the search team leader, stated that, upon entering the residence, there was "excitement" in the plaintiffs' voices, and the plaintiffs were "clearly concerned and worried and agitated." J.A. 4680, 4687. She explained that there was a "possibility that [the plaintiffs] would take some action that would make an unstable situation and that [the agents] would have to do something to get control again." *Id.* at 4689. Therefore, initially handcuffing the plaintiffs was a reasonable decision-in order to preserve officer and occupant safety and to properly execute the Warrant-and the agents' conduct was thus reasonable.[23]

Furthermore, it was not unreasonable for the federal agent defendants to keep the plaintiffs detained in handcuffs for nearly four hours. Agent McMahon stated that the plaintiffs were placed in handcuffs because the agents were executing a "terrorism-related warrant" and because the plaintiffs had "acted a certain way at the time of entry." J.A. 4694. McMahon further explained that, after "things had calmed down a bit," she moved the

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[23] We observe that the fact that the Warrant did not concern the plaintiffs personally is of no import. *Mena* explained that "when a neutral magistrate has determined that police have probable cause to believe contraband exists, '[t]he connection of an occupant to [a] home' alone 'justifies a detention of that occupant.' " 544 U.S. at 99 n. 2 (quoting *Summers*, 452 U.S. at 703-04).

handcuffs from the back to the front of the plaintiffs to make them more comfortable. *Id.* at 4702. At that point, however, McMahon explained that she "simply wasn't comfortable ... going from cuffed to totally not cuffed." *Id.* at 4704. The agents reassessed the situation as the search progressed, however, entirely removing the handcuffs after the women performed their afternoon prayers. "It was a progression of just a general sense of we're progressing with the warrant," McMahon explained. *Id.* at 4727. "[I]t was just a different moment," McMahon recalled, "and I made a different decision [to remove the handcuffs]." *Id.*

It is thus clear that the federal agent defendants reasonably assessed the circumstances presented, balancing the law enforcement interest of safety-of both the agents and the plaintiffs-with the "marginal intrusion" imposed on the plaintiffs. *See Mena,* 544 U.S. at 99. As such, there is no genuine issue of material fact, and the district court correctly awarded summary judgment to the United States.

B.

We now turn to the plaintiffs' challenge to the district court's dismissal of the First and Fourth Amendment *Bivens* subclaims against the federal agent defendants. In the First Amendment *Bivens* subclaim, the plaintiffs contend that the agents violated their rights to freely exercise their religion by (1) preventing them from wearing headscarves and covering their hands in front of the male agents, (2) photographing them without allowing them to wear their headscarves, and (3) preventing them from performing their prayers and ritual cleansing outside the presence of the male agents. By the

Fourth Amendment *Bivens* subclaim, the plaintiffs assert that the agents seized them without probable cause when they were detained during the execution of the Warrant.

By order of May 11, 2007, the district court ruled that the agents were entitled to qualified immunity on the Fourth Amendment *Bivens* claim. Then, on November 2, 2007, the court entered summary judgment on the FTCA claims and dismissed the First Amendment *Bivens* subclaim, ruling that it was moot. As explained below, because judgment has been entered on the FTCA claims in favor of the United States, the *Bivens* subclaims against the federal agent defendants are statutorily barred, and we affirm the dismissals of these claims.

In pursuing an intentional tort claim against a federal law enforcement officer, a prospective plaintiff may pursue two alternative avenues of relief. She may either pursue a constitutional claim against the officer directly under the Constitution, as recognized in *Bivens,* or she may file a tort claim under the FTCA. Should a plaintiff pursue the latter course, she runs the risk that her constitutional claim will be subject to the FTCA's "judgment bar" provision, which specifies that

> [t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

We have not heretofore assessed the scope and

ambit of the FTCA judgment bar provision. The plaintiffs contend that its reach is limited to those situations where a plaintiff has alleged the same wrong in a *Bivens* claim as in a separate FTCA claim. As such, the plaintiffs maintain that the district court's judgment against them on the FTCA claims does not foreclose their First and Fourth Amendment *Bivens* sub-claims, because those subclaims are predicated on different conduct and allege distinct injuries from the FTCA claims.

Contrary to the plaintiffs' assertions with respect to the scope of § 2676, our sister circuits have consistently viewed the FTCA judgment bar provision as precluding a *Bivens* claim against a government employee when a judgment has been entered on a FTCA claim "arising out of the same actions, transactions, or occurrences" as the *Bivens* claim. *Estate of Trentadue ex rel. Aguilar v. United States,* 397 F.3d 840, 858 (10th Cir. 2005); *see also Manning v. United States,* 546 F.3d 430, 431 (7th Cir. 2008) (recognizing that judgment on FTCA claim bars *Bivens* claim raised in same suit); *Harris v. United States,* 422 F.3d 322, 333-35 (6th Cir. 2005) (same); *Arevalo v. Woods,* 811 F.2d 487, 490 (9th Cir. 1987) (same).

Indeed, the text of § 2676 plainly supports this interpretation of the judgment bar's scope. In order for § 2676 to have effect, it must encompass all of the claims that could have been brought with regard to the conduct at issue against the responsible "employee of the government." In its recent *Manning* decision, the Seventh Circuit explained that the plain language of § 2676 reveals that Congress intended for the judgment bar to operate against claims brought

against a defendant for the conduct underlying the "action," as that term is used in § 2676. *See* 546 F.3d at 433. The term "action," the court observed, "incorporates all elements of a civil suit, including the claims within that suit." *Id.* (citing *Black's Law Dictionary* 31 (8th ed.2004)). Thus, "[b]y acting as a bar to *any* action, § 2676 bars the claims within that action." *Id.* at 434. Because a claim is a lesser part of an action, all related claims must come within the ambit of § 2676. In contrast, under the plaintiffs' interpretation, § 2676 would bar "any action," but would not bar pieces of that action, i.e., certain individual claims. Such a reading would be inconsistent with the text of the statute.

Litigants frequently face tough choices-choices that rarely come without consequence. In these proceedings, the plaintiffs chose to pursue their claims against the federal agent defendants through *Bivens* as well as under the FTCA. As such, they risked having a judgment on the FTCA claims operate to bar their *Bivens* theories. As explained above, the district court properly awarded summary judgment to the United States on the FTCA claims. Those claims arose out of the "same subject matter" as the First and Fourth Amendment *Bivens* subclaims-the execution of the Warrant-by the "employee of the government whose act or omission gave rise to the claim," i.e., the federal agent defendants. As such, the court's summary judgment award on the FTCA claims triggers the judgment bar provision of § 2676, and the plaintiffs' First and Fourth Amendment *Bivens* subclaims against the federal agent defendants are thus barred.

We observe, however, that the FTCA's judgment

bar provision only applies to "an action ... against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. § 2676. The plaintiffs' FTCA claims sought relief for intentional torts by the federal agent defendants only; they were not pursued against Agent Kane or Katz. The judgment bar thus does not preclude the claims against Kane and Katz, and we must address those claims separately.

C.

1.

We next address the plaintiffs' contention that the district court improperly ruled that Agent Kane is entitled to qualified immunity on the substantive *Bivens* claim against him. In support of this claim, the plaintiffs assert that Kane contravened the Fourth Amendment by misrepresenting material facts in the Affidavit. More specifically, they pursue on appeal their theories that Kane made two such misrepresentations. First, the plaintiffs assert that Kane falsely "concocted the term 'Safa Group,' and defined it to comprise over one hundred 'related' individuals, including Dr. Unus." Br. of Appellants 33. Second, they contend that Kane misrepresented that Safa Group organizations had transferred money internationally in order to mask the ultimate destination of particular funds.

On the first alleged misrepresentation, the plaintiffs contend that Agent Kane's use of the Safa Group label was "critical" to his assertion that evidence of criminal activity could be found at each location for which a search warrant was sought (including the Unus residence). Thus, they maintain,

the existence of a Safa Group was the only link between the suspect individuals and entities, permitting Kane to avoid the necessity of showing individualized probable cause for each location to be searched. *See* Br. of Appellants 33-34. According to the plaintiffs, because Dr. Unus was not suspected of committing any crimes, the only basis for probable cause to search the Unus residence was Dr. Unus's connection to the Safa Group. The plaintiffs assert that, had Kane not "concocted" the Safa Group label, the magistrate judge would have concluded that the Affidavit failed to show probable cause to search the Unus residence, and she would have denied Kane's search warrant application. *Id.*

On the second such misrepresentation, the plaintiffs assert that Agent Kane misrepresented to the magistrate judge that Safa Group entities transferred money internationally. The Affidavit, they contend, "identifies two distinct categories of suspected crimes: (1) providing material support to foreign terrorist organizations and 'layering' transactions to cover this up, i.e., engaging in international transfers of money to promote offenses against foreign nations, and (2) conspiracy to defraud the IRS." Br. of Appellants 32. The plaintiffs maintain that, absent an actual international transfer of money, the Affidavit fails to show probable cause to believe that any of the persons or entities identified therein had violated federal law.

Law enforcement officers are entitled to plead qualified immunity as an affirmative defense in lawsuits seeking money damages from them. *See Henry v. Purnell*, 501 F.3d 374, 376-77 (4th Cir. 2007). The qualified immunity defense "shields an

officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). An officer is protected by qualified immunity unless he is shown to have (1) violated clearly established law (2) that a reasonable officer should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Pearson v. Callahan*, 129 S. Ct. 808 (2009).[24]

We begin our qualified immunity analysis by assessing whether the plaintiffs sufficiently alleged that Agent Kane violated their constitutional rights. Accepting the truth of their allegations, we assess whether the plaintiffs have sufficiently alleged that Kane violated the Constitution. *See Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 307 (4th Cir. 2006). The plaintiffs allege Kane contravened their Fourth Amendment rights in two ways: by using the "Safa Group" label and by alleging that

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[24] Under the test employed by the Supreme Court in *Saucier v. Katz*, courts were required to assess a qualified immunity defense in a two-step sequence. *See* 533 U.S. 194, 201 (2001). First, a court had to determine if the plaintiff had sufficiently alleged that the officer violated the plaintiff's constitutional rights. *See id.* Only if the answer to that first question was "yes" could the court then assess whether the right violated was a clearly established right of which a reasonable officer should have known. *See id.* In *Pearson*, the Court held that this sequence is no longer mandatory. *See* 129 S. Ct. at 818. Rather, courts may "exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the particular circumstances of the case at hand." *Id.*

Safa Group organizations had transferred money outside the United States.

In *Franks v. Delaware,* the Supreme Court recognized that an officer contravenes the Fourth Amendment when he procures a search warrant through the use of false statements, whereby a magistrate would not have otherwise found probable cause. *See* 438 U.S. 154, 155-56 (1978). We have explained that the initial step in assessing a *Franks* claim is determining whether the affiant made a false statement "deliberately" or with "reckless disregard for the truth." *Miller v. Prince George's County, Md.,* 475 F.3d 621, 627 (4th Cir. 2007). We recognized in *Miller* that:

> [r]eckless disregard can be established by evidence that an officer acted with a high degree of awareness of [a statement's] probable falsity, that is, when viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported.

Id. (internal quotation marks omitted).

Mere allegations of "negligence or innocent mistake," however, do not amount to a constitutional violation. *Id.* at 627-28. If-and only if-there is a misrepresentation, the analysis then focuses on materiality of that misrepresentation. *See Franks,* 438 U.S. at 156; *Miller,* 475 F.3d at 629.

In addressing this issue, the district court explained from the bench that the plaintiffs had failed to provide "enough information to suggest that Agent Kane intentionally or recklessly attempted to

mislead the magistrate judge in filing this affidavit." J.A. 1151. The court determined that "the affidavit is proper and that [Kane's] conduct in obtaining the affidavit was proper," thus concluding that Kane was "absolutely entitled to qualified immunity." *Id.*

2.

After carefully assessing the Affidavit in light of the plaintiffs' allegations, we agree with the court's analysis and conclude that the plaintiffs have failed to show that Kane violated the Fourth Amendment. By using the term "Safa Group," not only did Agent Kane not make a factual misrepresentation, he made no factual representation at all. He simply applied a label in order to shorthand the identification of the persons and entities being investigated. On the second page of the Affidavit, Kane stated, "For ease of reference, I will refer to the web of companies and charities ... as the 'Safa Group.' " Affidavit 2 (emphasis omitted). Then, in his "executive summary," Kane again stated, "For the purpose of this affidavit, this group of individuals and the organizations that they operate will be referred to as the 'Safa Group.' " *Id.* at 6-7 (emphasis omitted). Kane thus made it clear to the magistrate judge that "Safa Group" was a mere label, not an attempt to short circuit the probable cause requirement; Kane could have used any term to identify these persons and organizations, and he simply chose to use the Safa Group label. Contrary to the plaintiffs' allegations, Kane carefully spelled out, in specific detail, the individuals and organizations suspected of having information regarding the underlying federal crimes, and how searching specific locations could lead to discovering evidence of federal law violations.

The plaintiffs thus fail to identify how Kane's use of the Safa Group label rose to the level of the unconstitutional conduct contemplated by *Franks* and *Miller*.

Likewise, the plaintiffs' assertion that Agent Kane misrepresented facts regarding international money transfers by suspect organizations also lacks merit. The essence of this allegation is that Kane stated in the Affidavit that certain of the suspect persons and organizations had transferred money overseas, when bank records show that no such transfers occurred. In the Affidavit, Kane primarily relied on two sets of documents: (1) IRS Forms 990 submitted by Safa Group entities showing that there had been financial transfers to entities on the Isle of Man; and (2) statements made during an IRS audit of a Safa Group entity. Furthermore, Kane identified other financial transfers of at least $200,000 by Safa Group entities in the United States to Canada, and the plaintiffs' counsel acknowledged that funds did in fact end up on the Isle of Man. *See* J.A. 1144-45 (explaining that Safa Group entity gifted funds to trust on Isle of Man).

Probable cause requires an affiant to show " 'a fair probability that contraband or evidence of a crime will be found in a particular place.' " *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). That some contradictory evidence may have been available, or may have come to light after Kane submitted his Affidavit to the magistrate judge, does not defeat the

existence of probable cause.[25] Simply put, the plaintiffs fail to sufficiently allege that Kane deliberately or with reckless disregard for the truth made any material misrepresentations of fact in violation of the Constitution, and we therefore affirm the ruling of the district court that Kane is entitled to qualified immunity on the substantive *Bivens* claim.

D.

We next assess the plaintiffs' contention that the district court erred in dismissing their *Bivens* conspiracy and § 1985 claims against Katz.[26] In dismissing those claims, the court explained that, "because I haven't found anything wrong with the affidavit, that would absolutely cut off Ms. Katz's liability as to the search." J.A. 1151. As explained above, we agree with the district court that the plaintiffs have failed to sufficiently identify any factual misrepresentations in the Affidavit, and

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[25] We further observe that the plaintiffs' contention that there was no probable cause to search the Unus residence because Dr. Unus was not suspected of any crime misapprehends the standard of probable cause. By the Affidavit, Agent Kane sought a search warrant to investigate financial transactions involving a group of individuals and organizations suspected of violating federal law. Kane did not have to show probable cause that Dr. Unus had committed a federal crime, just that " 'there [was] a fair probability that contraband or evidence of a crime [would] be found in' " the Unus residence. *Grubbs*, 547 U.S. at 95 (quoting *Gates*, 462 U.S. at 238).

[26] We have apparently never recognized a "*Bivens* conspiracy claim" as a substantive cause of action. Because the plaintiffs have failed to establish that there is a genuine issue of material fact with regard to this claim, however, we need not address whether such a cause of action is cognizable.

therefore, have failed to identify how Katz has caused any injury.

Although the plaintiffs allege that Katz conspired with Agent Kane to make material misrepresentations of fact to obtain the Warrant, they fail to allege a crucial component of any tort: causation. We have explained that, in order to establish a cause of action for a conspiracy under § 1985, a plaintiff must prove:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995); *see also Egervary v. Young*, 366 F.3d 238, 246 (3d Cir. 2004) (recognizing that "tort law causation" governs *Bivens* analysis).

In these proceedings, Katz cannot be tortiously liable for conspiring to violate the plaintiffs' constitutional rights because the plaintiffs have failed to identify any factual misrepresentations in the Affidavit, as detailed in the foregoing analysis of the substantive *Bivens* claim against Agent Kane. Absent such a misrepresentation, there is simply no link between Katz's role in the alleged conspiracy and the plaintiffs' complained-of injury. As a result, the plaintiffs have failed to state a claim against Katz on which relief can be granted, and we must affirm the district court's dismissal of the claims against her.

E.

Finally, we must address the plaintiffs' challenge to the district court's award of attorney's fees to Katz. Recognizing that 42 U.S.C. § 1988 does not authorize an award of attorney's fees in a *Bivens* action, the court observed, in its Fee Order, that the plaintiffs had also sued Katz under § 1985, a cause of action for which § 1988 authorizes such a fee award. Thus, because the § 1985 claim and the *Bivens* conspiracy claim each "arose from the same nucleus of operative facts, and the Court dismissed both based on its finding that there had been no constitutional violation of plaintiffs' rights," the Fee Order concluded that a § 1988 fee award was appropriate for Katz's defense of those claims. Fee Order 2. After deciding that § 1988 authorized a fee award in this situation, the court ruled that Katz was entitled to such an award for legal work performed after the filing of the First Amended Complaint, because, "although plaintiffs may not have been aware when they filed the [Initial] Complaint that their claims were groundless, they should have been so aware before they filed the [First] Amended Complaint." *Id.* at 5.

1.

Pursuant to § 1988(b), the "prevailing party" in certain civil rights proceedings is entitled to recover attorney's fees. Although the explicit provisions of § 1988 do not distinguish between a prevailing plaintiff and a prevailing defendant, the courts have nevertheless drawn such a distinction. Under controlling precedent, a prevailing civil rights plaintiff is ordinarily entitled to receive an attorney's fee award as a matter of course. *See Hensley v.*

Eckerhart, 461 U.S. 424, 429 (1983) ("[A] prevailing plaintiff should ordinarily recover an attorney's fee [under § 1988] unless special circumstances would render such an award unjust." (internal quotation marks omitted)). A much stricter standard applies, however, when a court is requested to make such an award to a prevailing defendant. *See, e.g., Jones v. Continental Corp.,* 789 F.2d 1225, 1232 (6th Cir. 1986) (describing fee award to civil rights defendant as "extreme sanction" reserved only for "truly egregious cases of misconduct").

In order for a prevailing defendant to be entitled to recover attorney's fees under § 1988, the plaintiff's claim must have been either " 'frivolous, unreasonable, or groundless,' " or the plaintiff must have " 'continued to litigate after [the claim] clearly became so.' " *Lotz Realty Co. v. U.S. Dept. of Housing & Urban Dev.,* 717 F.2d 929, 931 (4th Cir. 1983) (quoting *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 422 (1978)). Indeed, the mere fact that a civil rights plaintiff lost her case does not render her claim frivolous, unreasonable, or groundless. As the Supreme Court explained in this regard:

> [I]t is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Christiansburg, 434 U.S. at 421-22; *see also Sensations, Inc. v. City of Grand Rapids,* 526 F.3d

291, 303 (6th Cir. 2008) ("The Sixth Circuit affirms awards of attorney fees [to prevailing defendants under § 1988] only when plaintiffs relitigated already-settled legal matters, and we reverse the award of attorney fees when issues of law remained unresolved or when a plaintiff had an arguable basis for pursuing his or her claim." (internal quotation marks omitted)).

The purpose of distinguishing between a fee award being made to a successful plaintiff, on the one hand, and such an award being made to a prevailing defendant, on the other, arises out of the legitimate concern for the "chilling effect" that the latter type of award would have on potential civil rights plaintiffs-and their lawyers-in deciding whether to initiate lawsuits. *See Lotz*, 717 F.2d at 932. We have explained, however, that "[w]hen a court imposes fees on a plaintiff who has pressed a 'frivolous' claim, it chills nothing that is worth encouraging." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993).

2.

In this case, Katz prevailed on a claim for which § 1988 does not authorize a fee award (the *Bivens* conspiracy claim), as well as on a separate claim for which § 1988 makes such an authorization (the § 1985 claim). As explained below, without deciding whether § 1988 authorizes a fee award for the time Katz spent defending both those claims, we are content to reverse the fee award made to Katz because the plaintiffs' claims fail to qualify as either "frivolous, unreasonable, or groundless."

a.

The Fee Order provided three specific bases for

its ruling that the plaintiffs should have been aware that their claims against Katz were frivolous, unreasonable, or groundless. First, the district court emphasized that, upon dismissing the Initial Complaint, it had "warned plaintiffs on the record that any Amended Complaint must include ... specific allegations." Fee Order 4. But "[i]nstead of recognizing that their claims were groundless," the court explained, "plaintiffs filed an Amended Complaint that included only minor changes to their insufficient allegations of material misrepresentations." *Id.* Second, the court observed that one of the "asserted misrepresentations-that alleged associates of Dr. Unus had engaged in untraceable overseas money transfers-had already been rejected by another federal court," and the plaintiffs were thus on notice that their claims against Katz were groundless. *Id.*[27] Finally, according to the district court, the plaintiffs' motion for reconsideration "was based on a continued misunderstanding of the law of probable cause, an error that the Court [had previously] explained to plaintiffs in the January 11, 2005, hearing." *Id.* at 4-

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[27] In discussing the ruling made by "another federal court," the district court was referring to a defamation suit instituted against Katz in Georgia by Safa Group entities for statements that Katz made on national television. In those proceedings, the court concluded that the alleged misrepresentation regarding the international transfer of money was unavailing, and that the Affidavit established probable cause. *See Mar-Jac Poultry, Inc. v. United States,* No. 2:03-cv-00232 (N.D. Ga. June 21, 2004). That decision did not, however, involve an attorney's fee issue, and neither Aysha nor Hanaa Unus was a party to that litigation.

5.

By awarding attorney's fees to Katz, the district court abused its discretion, because the plaintiffs' claims against Katz were not frivolous, unreasonable, or groundless, and the "extreme sanction" of awarding such fees is thus unwarranted. *Jones,* 789 F.2d at 1232. More specifically, the record reveals that the court's three bases for its fee award are insufficient.

i.

First, in the Fee Order, the district court erred when it relied, as a basis for the fee award, on its conclusion that the plaintiffs had failed to replead their claims with greater specificity. In the Initial Complaint, the plaintiffs alleged simply that "Kane and Katz ... conspired to contrive allegations that there were relevant financial documents located at the homes of certain individuals they wanted to search." Initial Complaint 5. The plaintiffs thus failed to support the alleged wrongdoing by Katz with specific facts. A comparison of the Initial Complaint and the First Amended Complaint, however, reveals that the plaintiffs heeded the court's instructions and supported their claims in the First Amended Complaint with, as instructed by the court, "the specific allegedly false statements that are in the affidavit and a description of why that falsity would be material to the ultimate finding of probable cause." J.A. 1032.

In the First Amended Complaint, the plaintiffs alleged, inter alia, that Kane and Katz made three material misrepresentations of fact in the Affidavit: (1) that Kane and Katz "invented the term 'Safa

Group,' " and that no such group exists; (2) that Kane and Katz misrepresented that "alleged 'Safa Group' 'member' Dr. Unus had been under investigation since 2000"; and (3) that Kane and Katz misrepresented that Safa Group entities had transferred money internationally. First Amended Complaint 9. The First Amended Complaint also described how those misrepresentations were material to the probable cause determination. It alleged that the first misrepresentation was "material to a probable cause determination to search the Unus home because Dr. Unus is described as the billing and administrative contact for the IIIT" in the Affidavit. *Id.* Absent a link between the IIIT and the Safa Group, the First Amended Complaint asserted, there was no probable cause to search the Unus residence. The second misrepresentation was relevant to the probable cause issue because it gave the false impression that Dr. Unus had been under investigation by the federal government. And, with respect to the third misrepresentation, the First Amended Complaint explained, "Kane and Katz knowingly proffered a false money laundering claim which, when added to the false claim of a close relationship between and among over one hundred entities and individuals, convinced the Magistrate to approve a warrant to search the Unus home." *Id.* at 10. Thus, although the plaintiffs' allegations ultimately failed to survive a Rule 12(b)(6) motion, the plaintiffs had substantially complied with the court's earlier instructions when it dismissed the Initial Complaint, and the Fee Order improperly relied on a finding to the contrary as a basis for the fee award.

ii.

Second, we find unavailing the district court's pronouncement that the plaintiffs' claims were groundless because a district court in Georgia had ruled that the Affidavit established probable cause. Although we agree that the Affidavit established probable cause, the Georgia court's ruling is neither controlling nor probative here. And, as nonparticipants in the Georgia litigation, the plaintiffs should not be held to suffer its effects. *Cf. Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009) (recognizing that res judicata requires, inter alia, claims by same parties or privies). Furthermore, the Georgia court's ruling touched on only one of the alleged misrepresentations, thus having no potential impact on the other asserted bases of the plaintiffs' claims against Katz.

iii.

Finally, the mere fact that the plaintiffs' lawyers misunderstood certain legal aspects of the probable cause issue does not render the First Amended Complaint frivolous, unreasonable, or groundless. Indeed, it was entirely reasonable for the plaintiffs and their lawyers to seek court review of the search warrant process, because the Warrant was premised-at least to some extent-on Katz's off-the-wall theory that all members of one of the world's major religions are terrorists. *See* First Amended Complaint 5 (alleging that Katz's "belief that all Muslims are terrorists was conveyed to the agents," including Agent Kane). This theory was allegedly espoused by Katz in her book on terrorism, called *Terrorist Hunter*, in which she also referred to herself as the

Green Quest investigation's "stealthy guiding beam," and the Safa Group investigation as "[her] investigation, [her] baby, [her] project." *Id.* at 18 (internal quotation marks omitted).[28] Furthermore, the plaintiffs alleged that Katz had continually urged Kane to seek search warrants, despite Katz having been advised by "one or more" federal prosecutors that there was no probable cause to search the homes of the individuals associated with the Safa Group, such as Dr. Unus. *See id.* at 6-7.[29] Though ultimately unsuccessful, the sum of the plaintiffs' contentions-that Katz, driven by a religion-based animus, had conspired with federal agents to manufacture probable cause to obtain unlawful search warrants-was certainly nonfrivolous and warranted serious and careful judicial consideration. *Cf. Hughes v. Rowe,* 449 U.S. 5, 15 (1980) ("Even those allegations that were properly dismissed for failure to state a claim deserved and received the careful consideration of both the District Court and the Court of Appeals."); *Rodriguez v. Smithfield Packing Co.,* 338 F.3d 348, 354 n. 4 (4th Cir. 2003) (affirming denial of § 1988 fee claim pursued by prevailing defendant).

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[28] These specific allegations-about all Muslims being terrorists and Katz claiming the federal investigation as her own-were first made in the First Amended Complaint, after the district court had directed the plaintiffs to particularize the claims made in the Initial Complaint.

[29] In her book, Katz favorably describes how she convinced the United States Attorney to approve an application for several search warrants, including the Warrant to search the Unus residence, despite his initial reticence. *See Terrorist Hunter* 322-23.

b.

Significantly, both the district court and Katz-in support of the fee award-relied on our *Hutchinson* precedent. where we reinstated fee awards to prevailing civil rights defendants. *See* Fee Order 1, 3 (citing *Hutchinson,* 994 F.2d at 1080); Br. of Appellee Katz 48, 52 (same). That decision, however, involved much more egregious conduct than that presented here. In *Hutchinson,* the defendants prevailed after years of vexatious litigation. The plaintiffs-who lost an election-had, as Judge Wilkinson explained, "alleged a two-county-wide election-rigging conspiracy worthy of an Oliver Stone screenplay." *Hutchinson,* 994 F.2d at 1081. In reinstating the fee awards, our panel emphasized that the plaintiffs had narrowly survived a Rule 12(b)(6) motion to dismiss, and that they "were unable to back their conspiracy theory [at trial] with anything beyond conjecture and speculation." *Id.* at 1080. Furthermore, the plaintiffs were found by the district court as motivated by revenge and a desire to prolong the litigation. *See id.* In such circumstances, the fee awards were deemed justified because the "defendants were forced for several years, and at great expense, to fend off a claim that proved to be factually baseless." *Id.* at 1081.

In *DeBauche v. Trani*, in 1999, we reviewed a § 1988 fee award to a prevailing civil rights defendant. *See* 191 F.3d 499 (4th Cir. 1999). In that litigation, the plaintiff, a minority-party gubernatorial candidate in Virginia, had sued a host of individuals under 42 U.S.C. § 1983 for conspiring to deny him the opportunity to participate in a political debate conducted at a public university. One of the

defendants, a talk show host and former Governor of the Commonwealth, had successfully defended against the suit, and the court awarded him attorney's fees under § 1988. *See id.* at 503-04. In affirming the fee award for our Court, Judge Niemeyer emphasized the frivolous nature of the plaintiff's claims. "Both the Supreme Court and our court," he explained, "have been very clear" that the Constitution does not apply to purely private actors such as the defendant, and therefore it was well-settled that a § 1983 claim against the defendant was legally groundless. *Id.* at 510. Thus, under those circumstances, the district court was within its discretion to award fees under § 1988. *See id.*

Importantly, the plaintiffs in this case supported their conspiracy claims against Katz in the First Amended Complaint with specific factual allegations, rather than-as in *Hutchinson*-with mere conjecture and speculation. And this record lacks any indication that the plaintiffs were somehow motivated out of spite to prolong the litigation or increase the litigation costs. Unlike the claims asserted in *DeBauche*, those made against Katz were not predicated on plainly baseless causes of action that ran counter to established legal principles. Rather, the claims against Katz, viewed in an objective light by a reasonable lawyer, allege unsettling, discrimination-fueled acts by Katz that-though ultimately unsuccessful-were not undeserving of serious and careful consideration in a court of law. In awarding fees to Katz, the district court thus seems to have engaged in the "kind of hindsight logic [that] could discourage all but the most airtight claims." *Christiansburg*, 434 U.S. at 422; *see also LeBlanc-*

Sternberg v. Fletcher, 143 F.3d 765, 770 (2d Cir. 1998) (urging caution in assessing fee award issues-particularly on conspiracy claims-involving prevailing civil rights defendants). As a result, the plaintiffs' claims against Katz were neither frivolous, unreasonable, or groundless, the court abused its discretion in making the fee award to Katz as a prevailing defendant, and we reverse the award.[30]

IV.

Pursuant to the foregoing, we affirm the district court's dismissal of the claims alleged against Agent Kane, Katz, and the federal agent defendants, as well as its summary judgment award in favor of the United States. We reverse, however, the attorney's fee award made to Katz.

AFFIRMED IN PART AND REVERSED IN PART.

WILLIAMS, Chief Judge, concurring in part and dissenting in part:

I agree with the majority's resolution of the constitutional and common law tort claims asserted by Aysha and Hanaa Unus and concur in those portions of the opinion. For the reasons stated in the district court's fee order of April 28, 2005, however, I

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[30] Because the claims against Katz were neither frivolous, unreasonable, nor groundless, the plaintiffs did not continue to litigate those claims after they clearly became so. *See* Fee Order 5. That aspect of the district court's ruling is thus undermined.

would affirm the award of attorney's fees in favor of Rita Katz. I therefore respectfully dissent from Part III.E. of the majority opinion and from the judgment to the extent it reverses that award.

UNITED STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 1:04CV312
AYSHA UNUS, ET AL., PLAINTIFFS,

V.

DAVID KANE, ET AL., DEFENDANTS.

Transcript of Motions Hearing
Before the Honorable Leonie M. Brinkema
United States District Judge

Alexandria, Virginia
February 3, 2006
10:00 a.m.

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PROCEEDINGS

THE CLERK: Civil Action 2004-312, Aysha Unus, et al. v. Roger Aarons, et al. Counsel, please note their appearance for the record.

MR. LAVALEE: Good morning, Your Honor. I am Fernand Lavallee on behalf of the plaintiffs, the Unuses, and I would like to respectfully request that this morning, that the Court also hear my colleague, Mr. Steven Barentzen, who has been admitted pro hac vice before this Court.

THE COURT: All right. Good morning.

MR. LAVALEE: Thank you, Your Honor.

MR. BARGHAAN: Good morning, Your Honor. Dennis Barghaan, assistant United States attorney, on behalf of the defendants.

THE COURT: All right, Mr. Barghaan. This is the government's — well, there are two motions that you're presenting. One on behalf of the United States is a motion to — counsel, you may have a seat — is to dismiss Counts 2 and 3 for which the government, the federal government is now the defendant —

MR. BARGHAAN: Correct.

THE COURT: — under the Federal Tort Claims Act. Your motion is really not opposed by the plaintiff, where they recognize that they have failed to exhaust the required administrative remedies, and

as you know, in their pleading, they've requested that any dismissal be without prejudice, giving them leave to exhaust those administrative remedies and then to be able to proceed on those two counts.

MR. BARGHAAN: That's correct.

THE COURT: So I will go ahead and grant that part of your motion — or one of your two motions and dismiss Counts 2 and 3 without prejudice. The time period in which to do the exhaustion process is 60 days?

MR. BARGHAAN: It's 60 days, Your Honor. 28 U.S.C. 2679(d) provides 60 days from the date of Your Honor's without prejudice dismissal to file those administrative claims, and from that point, Your Honor is well aware of the traditional time limits at that point, which are a combination of the plaintiffs' desire to await a result at the agency level and those agencies' desire to either deny or engage in settlement discussions at that point.

So the, the — if the agencies move quickly and deny the claims within a matter of weeks, we could be back here with another amended complaint only as to the United States. I understand that that's regarding my other motion, but within a matter of weeks, or if the agencies take more time, which unfortunately is usually the case, the plaintiffs have the opportunity after six months to deem it denied and then come back to this Court.

THE COURT: But in any case, the likely — the time that's likely here is a six-month delay.

MR. BARGHAAN: I would presume that's correct, Your Honor.

THE COURT: All right. So that raises then a follow-up issue, because in that process, there can be an effort made to resolve or settle the dispute.

MR. BARGHAAN: Yes.

THE COURT: All right. I think that bifurcating this case makes no sense in my view, that we ought to treat the whole case as an entity —

MR. BARGHAAN: Correct.

THE COURT: — and since I'm going to have to dismiss two counts, it makes a significant amount of sense to me to just dismiss without prejudice the entire complaint at this point and give plaintiffs leave to refile no later than six months from today's date, which allows the full time period to expire, correct?

MR. BARGHAAN: It would be six months from the date they filed the administrative claim.

THE COURT: Eight months would be the outside limit.

MR. BARGHAAN: Yes.

THE COURT: All right. And in that time period, to see whether or not this case can be resolved.

That is a segue into the second part of this case,

all right? The government has moved to dismiss — the individual defendants have moved to dismiss on multiple grounds. The one that's been the most briefed is this issue about the statute of limitations.

I'm not convinced that any of the case law that either side has presented the Court — and perhaps there is none out there — addresses this specific situation, and that is, where the original complaint was clearly filed within the two-year statute of limitations. I don't believe the individual defendants dispute that, correct?

MR. BARGHAAN: No.

THE COURT: All right. And when it was originally filed, it was filed with a series, as we know, of Jane and John Does, because the identity of the agents who executed the search warrant apparently was not known to the plaintiffs, and the plaintiffs do recite a litany of efforts made to obtain those names, and I'm not faulting the government, but for various reasons, those names were not forthcoming until there had to be a little, I think, persuasion applied.

So I don't think the argument that the plaintiffs cannot get the benefit of the relation back document really is fair in this case. I mean, I understand you are literally looking at the literal language of rule 15, and rule 15 does not appear to exactly apply to this situation, but the spirit of the doctrine, it's not as if the plaintiffs, you know, delayed or manipulated the system and have put the defendants at a disadvantage because it's beyond the time period.

It appears as though they were making vigorous efforts to find out who these people were so they could actually name them, and it was only after intervention that they were able to achieve that. So I think you need to address that, Mr. Barghaan.

MR. BARGHAAN: I will, and I have a couple arguments on that score, Your Honor.

THE COURT: All right.

MR. BARGHAAN: As we laid out extensively in our reply memorandum, the analysis that plaintiffs have articulated and Your Honor has just articulated is one that requires more language to be added to rule 15(c). Rule 15(c) says you do not get the benefit of relation back unless you can demonstrate that there has been a mistake in not naming the correct party.

Almost every single Court of Appeals that has addressed this question, the Third Circuit notwithstanding, including the Fourth Circuit in *Western Contracting*, has said that that language does not apply if the reason you didn't name them at the outset is because you didn't know who they were.

It only applies, rather, Your Honor, when you were mistaken as to which is the correct party in the lawsuit.

THE COURT: But here's the problem: If the other side, if the party that knows who they are is not providing that, I think the proper analysis here, regardless of what rule 15 says, the proper analysis is that the plaintiffs timely filed their lawsuit and they

timely identified with a Jane or John Doe who they wanted to be defendants in this case, and it was the government who clearly knew well within the statute of limitations who these people were.

Now, the government may have chosen not to reveal the names. I don't think that's at all fair to say to a plaintiff that you're time-barred.

It's different if they had waited two years and a day to file any suit at all against your folks, but again, that's why I'm saying there have been Jane and John Doe filings in the past. You-all don't have an example of a case that involved a Jane or John Doe where the identity of the defendants was basically controlled by the defendants and they weren't forthcoming with it?

MR. BARGHAAN: Here's the problem with that argument, Your Honor.

THE COURT: Wait. My first question is is there any case law that's addressed that particular fact pattern?

MR. BARGHAAN: There are cases in which courts have held that tolling a statute of limitations in a John Doe context is not appropriate when it is not the defendants who have concealed the information, and that leads into what I was about to say.

THE COURT: All right.

MR. BARGHAAN: Your Honor says the government concealed information. I disagree with

that assessment, but let's assume that that is the case for sake of argument.

The government is not the defendants who are moving to dismiss. It is individual capacity defendants who come to this Court, as Justice O'Connor said in *Hafer v. Melo*, as individuals. They do not assume the identity of the government that employs them, and moreover, they are not in privity with the government such that doctrines of collateral estoppel or if the government's attempts to conceal information — if you're accurate in that respect — can be imputed to them.

The Supreme Court in *United States v. Kubrick* held that the statute of limitations has a purpose to give the individual or entity, whatever it is, the right to repose after a couple of years and —

THE COURT: Mr. Barghaan, under the facts of this case, especially because David Kane was an FBI agent, I'm assuming, in the same unit or office as many of these named defendants, you can't tell me that the FBI was not on notice about this case and that people involved in this search were not on clear notice that there was litigation that had been filed concerning it. I mean, you just can't on this record make that argument.

MR. BARGHAAN: But that's the — that' s only one part of the analysis, Your Honor, not the part about mistake. Every Court of Appeals in the John Doe context with the exception of the Third Circuit has said merely naming a John Doe does not get relation back, and there is nothing in either the rule

or its — the Advisory Committee notes are the same, that provide that when the equities favor a particular result, the Court is entitled to draft newer language or to come up with a new definition of the term "mistake."

I have a feeling I'm sort of beating a dead horse on this front, but to be honest, Your Honor, the case law is clear. Legislative —

THE COURT: No, no, the case law hasn't addressed this particular fact pattern. Otherwise, it creates a terrible nightmare for a plaintiff who believes, rightly or wrongly, that they have been the victim of misconduct by government agents. Remember, the average citizen can't get such things as the identity of people who work for the FBI.

I think in this particular case, the FBI was put on clear notice of this litigation. You knew exactly the universe of individuals whom this plaintiff was seeking to include in the lawsuit, and therefore, I don't think the government — the individual defendants can hide behind the difficulties that existed in this particular unique case with a very specific fact pattern.

So I'm going to not grant your motion to dismiss on the basis of the statute of limitations. I am satisfied given the way in which the case was originally pled that these defendants were on at least constructive notice that they were being sued within the time limit, and there isn't any possible argument that — in my view, rational argument that they get the benefit of the statute of repose. They knew

within the two-year time period that these plaintiffs were litigating — bringing a lawsuit against them.

And so I understand your argument, and down the road, I may be, you know, proven wrong or right on this call, but I'm very comfortable in that conclusion.

Now, that's not the only issue you've raised in your motion to dismiss.

MR. BARGHAAN: That is correct.

THE COURT: You've also raised an issue that these agents are entitled to qualified immunity, and as you know, again, the plaintiffs have extensively argued that, in fact, at the time these searches were executed, there was clearly established law indicating that there are limits as to the manner in which agents may restrain or treat persons who are in their home when a search is being conducted, and in particular, there are some cases that have held that the detention with handcuffs of three or four hours when the search is a search involving, you know, non-serious contraband, in other words, weapons are not involved or drugs or very serious things, may be problematic.

Now, the problem I have with this particular case on the qualified immunity issue is, as is often the case with qualified immunity, is they can be very, very fact specific. For example, if, if the mother or the daughter was hysterical, very emotional, you know, yelling at the agents, then the manner in which they responded to that would be completely

appropriate and would undercut any argument that there'd been a violation of the plaintiff's rights.

I can't on the bare pleadings before me make that determination, and so I think as a matter of law, at this point, the Court is not able to make a determination as to whether these agents can be dismissed for qualified immunity. In the context of summary judgment or a motion to dismiss when more evidence has been developed, it may inform the Court differently.

I've had experience with these types of cases. The most recent one is the *Willingham* case, which was a case involving state police action by a person who claimed to have been mistreated when the police were — entered a home looking for somebody, and the Fourth Circuit reversed this Court when we granted summary judgment for the agents, finding that certainly the law was clearly established at that point, and whether the facts would actually support a finding of immunity could not be developed sufficiently at summary judgment and needed to go to trial. That case actually has been tried many times, and each time the jury found for the police, but we're at a very preliminary stage.

So I'll give you a moment if there's anything you want to add to the record.

MR. BARGHAAN: I do.

THE COURT: Yes.

MR. BARGHAAN: I do. The problem with Your Honor's analysis on that front is that it presupposes a

clearly established constitutional right to be free from handcuffing during a detention that occurs during the search of one's home.

As the Fourth Circuit articulated recently in *Altman v. City of High Point,* which was a 2001 decision from North Carolina, clearly established law can only be derived in this circuit from two entities — the Supreme Court of the United States and the Fourth Circuit.

In that regard, the only case that the plaintiffs cite for the proposition that detention in handcuffs runs afoul of the Constitution is *Muehler v. Mena*, which is the 2005 Supreme Court decision, which obviously can't control the qualified immunity inquiry here because this occurred in 2002, and *Michigan v. Summers*, which is the 1981 decision where the Supreme Court says that one can engage in detentions during the execution of a search warrant.

Nothing in the Supreme Court or the Fourth Circuit's jurisprudence to my knowledge — and the plaintiffs cite nothing to the contrary — held until *Muehler* in 2005 that the Court's *Graham v. Conner* excessive force jurisprudence applied to *Summers* detentions.

A reading of *Summers* alone, Your Honor, suggests that one can be detained during the conduct of a search. It says nothing about what — how that detention is effectuated.

And this is exactly the penultimate example of

what the Supreme Court held in *Anderson v. Creighton*, that is, that the inquiry at issue has to be — when it comes to clearly established law, has to be judged at the requisite level of specificity. It is not is the Fourth Amendment violated, but it's clear the Fourth Amendment is clearly established, but rather, as the Supreme Court held in *Saucier v. Katz*, it is whether the constitutionality of this action in the situation they confronted was unconstitutional.

THE COURT: What about the First Amendment issue in this case?

MR. BARGHAAN: I'm sorry, excuse me?

THE COURT: What about the First Amendment issue in this case?

MR. BARGHAAN: We have not moved to dismiss on qualified immunity grounds, and, you know, the plaintiffs excoriate us for that. There was a reason. I did not believe that that was a, at this stage in the proceedings a good motion to dismiss, and Your Honor knows my character and the way I operate. I would not have made that motion if I thought —

THE COURT: So it's just the false arrest.

MR. BARGHAAN: It's the handcuffing.

THE COURT: Handcuffing.

MR. BARGHAAN: And to be sure, Your Honor, we also did move to dismiss the conclusory legal allegations of conspiracy and aiding and abetting.

One cannot proceed — the Fourth Circuit is very clear on this: Discovery or not, on a bare conclusory legal allegation of conspiracy or a conclusory legal allegation of aiding and abetting, and to be sure, on the aiding and abetting front, there's no case law to suggest that aiding and abetting is any different than conspiracy or that it applies in *Bivens* cases outside of the we want to get a private defendant and make it state action.

So in short, the only cases they cite are out-of-circuit, both circuit and district court opinions that hold that excessive force concepts of *Graham v. Conner* apply in a *Summers* detention.

THE COURT: All right, let me hear the response to that. Do you have, Mr. Barentzen, any other directly on point Fourth Circuit or Supreme Court law that existed at the time the searches were conducted? I think counsel is correct that out-of-circuit cases would not comply.

MR. BARENTZEN: I think that's — I think that's correct. I do think that the principle that was clearly announced in the *Summers* case by the Supreme Court in 1981, 25 years ago, clearly established that the defendants' actions in this case violated the Fourth Amendment.

That case stated the general rule that in this country, Americans are free from seizures without probable cause, and that's the general rule. And there are some very limited exceptions to that rule, like the *Terry* case, a *Terry* stop.

In the *Summers* case, another very limited exception was carved out, and it said when the government is conducting a search for contraband, drugs or weapons, a dangerous situation, a detention, not handcuffing, a detention under those facts could be reasonable.

And I would suggest, Your Honor, that the rule always has been and it has been reannounced in *Summers* and it's Supreme Court precedent that you simply cannot go into someone's home in the course of a search and handcuff them, especially here, where there's no reason to believe there's criminal activity afoot, there's no reason to believe the people that are being handcuffed are criminals, and there's no reason to believe there's any danger.

And, in fact, even if an initial detention here may have been reasonable, this one lasted for four hours, and these were the only two women home, and there was 11 armed federal agents. It's clear to me that it was entirely unreasonable to keep them detained in handcuffs for four hours, and I believe the precedent is found in the *Summers* case.

THE COURT: Well, the problem with qualified immunity analysis, though, I believe the term is clearly established, all right, not just possibly there, the law does not expect agents on the scene to be lawyers who can parse nuanced differences. I think the status — the requirement of the law is that it be a clearly established principle of law and that again the limitation on that is the agents are not expected to have to read the Third Circuit and the Ninth Circuit, in this jurisdiction it would be the Fourth

Circuit, and the Supreme Court.

The situation might be different now in 2006, but we also have to look at the status of the law at the time the agents took their actions.

MR. BARENTZEN: That's correct, Your Honor. At the same time, it's clear that you don't need to have a case that's on all fours, and it's going to be very unlikely.

THE COURT: It would have to be at least on all threes. I mean, on this one —

MR. BARENTZEN: Or there has to be a well-established constitutional principle that's violated and that a reasonable person know — would know would be violated here. I mean, I think what's significant here, Your Honor, is on the same day of this search and then the following day, there were approximately 20 other searches conducted by the government during the course of the Operation Green Quest. It is my understanding that in none of these other cases were individuals handcuffed and detained during the course of those searches.

That leads me to believe that the government knew or ought to have known this is something that you cannot do. You cannot go into a person's home and handcuff them without probable cause to arrest them, and I think that was clearly established in *Michigan v. Summers*.

THE COURT: Well, the problem, though, your argument just now may also down the road if the case were to stay on the Court's docket, there may

have been facts going on. Again, there might have been, as I said, crying, hysteria. Things happen at people's homes.

And again, any agent who's in the course of a search, you don't know what you're walking into. The sad fact is that right now, the al Qaeda is beginning to try to use women. We've recently — you know, traditionally there hadn't been women suicide bombers. Now there have been some in the media.

An agent in the field — and the reason why qualified immunity is a very practical oriented concept is — and it's another example of the law trying to weigh competing interests. You've got the reality of law enforcement people trying to do their job in situations where there's never any certainty or guarantee that they will not be attacked or there won't be a problem, and yet you also have the very serious concern about making sure that people's rights are not trampled, and you've got to do a balancing act here, and that's why again the concept that the — the constitutional right has to be clearly established, and then it takes, you know, a case like this moves that level of understanding along.

I mean, I would assume at some point the Fourth Circuit will be issuing an opinion relating to decisions made in this case. That will more specifically clarify the law for the next actions by agents. That's how the law evolves, and you-all are assisting that process by filing cases of this sort.

But I believe that Mr. Barghaan has actually correctly stated the status of the law at the time

these agents took the actions that they did, and so the handcuffing aspect of this case I will grant the motion to dismiss on the basis of qualified immunity.

I also think that there is no legal basis upon which either the conspiracy or aiding and abetting claims can go forward.

That still leaves, however, the First Amendment issues about unlawful violation of your clients' freedom of religion, and that is a problem — a troubling issue in this case and which is why I go back to my very first point, which was apparently you will all have the opportunity at the mediation process in this case, it is clear that unless there are extenuating circumstances of threats to the security of the police officers or the danger of evidence being destroyed, that the religious rights of persons have to be respected.

This Court will stop court proceedings to allow Muslims who are in this courthouse to observe their requirements to pray at certain times of the day, and the government is expected to accommodate that, and the allegations in this case both as to the refusal to allow the women to wear their head scarves, which for Muslim women is a very serious problem, after the agents perhaps had made reasonable assurances that those scarves were not going to hide contraband or somehow create a threat for them, and issues about being able to pray and also just, you know, the way in which the women were being observed, I mean, those are problematic, and so I do think that those issues need to be looked at with great care and may very well be resolvable in the administrative

process.

So what I'm going to do is I'm going to dismiss the entire second amended complaint without prejudice, because I don't see any reason to leave that one count here and then have to perhaps down the road do the false arrest. I mean, it all grows out of the same universe of facts. I don't think there's any prejudice to anybody.

The government is not going to argue some kind of statute of limitations on the First Amendment issue, right, if we stay this case for a period of —

MR. BARGHAAN: If the case continues, I think what the defendants might have to do to preserve the issue for appeal is move to dismiss again, but I would obviously understand and put in the motion that we understand that Your Honor has ruled and that we do this simply to preserve the issue for appeal down the road if necessary, if that makes sense.

THE COURT: It does. What — I have two options here, is I can stay this case with just the one remaining count, which is, what, Count 1, correct, in this case, the way the complaint is phrased?

MR. BARENTZEN: That's correct, Your Honor.

THE COURT: Yes. I can stay Count 1 for up to eight months to see how Counts 2 and 3 evolve after the administrative process has worked its way, and as I said, you may settle the whole case, or I can dismiss the whole case. It might be better just to stay it.

MR. BARENTZEN: Your Honor, I would — because of the statute of limitations here issues and I haven't researched them, I'm concerned about a dismissal and then on some technicality us having problems down the road. I think the staying would be the better option.

THE COURT: All right. What I'm doing is I'm dismissing I believe it's Counts 4 and 5, the conspiracy and aiding and abetting counts. Those are with prejudice.

I am dismissing Counts 2 and 3 without prejudice. The plaintiff has leave to file an amended complaint as to Counts 2 or 3 or to ask them to be reinstated, depending upon what happens at the administrative process, but you have an eight-month limitation on that.

And on the Count 1, which is the constitutional violation of the First Amendment, I'm going to stay that count until no more than eight months so we figure out what's happening with Counts 2 and 3, so that we're not going to have piecemeal litigation of these issues, because it's all related.

That means it takes you off of the discovery calendar. It takes you off — everything is stayed, all right?

MR. BARGHAAN: One point of clarification, Your Honor.

THE COURT: Yes.

MR. BARGHAAN: You just indicated that on

Count 1, you'd be staying for eight months. I presume that that portion of Count 1, which as I recall the second amended claim is the *Bivens* count —

MR. BARENTZEN: Right, right.

MR. BARGHAAN: That that portion of it that relates — their Fourth Amendment claim of handcuffing is dismissed with prejudice.

THE COURT: Yes.

MR. BARGHAAN: Okay.

THE COURT: Yes, because of qualified immunity. All right? Okay?

MR. BARGHAAN: Thank you, Your Honor.

THE COURT: So that's my ruling. And then, of course, there is the pending appeal on the other two defendants.

MR. BARGHAAN: Right. Just so Your Honor knows — and you'll correct me if I misspeak — that appeal has been noted. It's been taken. The briefing schedule has been stayed pending our motion to dismiss for lack of jurisdiction in the Court of Appeals.

THE COURT: Ah, okay. All right.

Well, in this case, that, I believe, resolves this, all right?

MR. BARGHAAN: Thank you, Your Honor.

THE COURT: We'll recess court for the day.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

/s/

Anneliese J. Thomson

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

NO. 1:04CV312

AYSHA UNUS, *ET AL.*,
PLAINTIFFS,

V.

DAVID KANE, *ET AL.*,
DEFENDANTS.

ORDER

For the reasons stated in open court, the United States' Motion to Dismiss is GRANTED, and it is hereby

ORDERED that Counts II and III be and are DISMISSED WITHOUT PREJUDICE.

The Individual Defendants' Motion to Dismiss be and is also GRANTED, and it is hereby

ORDERED that the portion of Count I alleging that defendants unreasonably detained plaintiffs by handcuffing them, as well as all of Counts IV and V be and are DISMISSED WITH PREJUDICE.

This decision leaves only Count I's alleged violation of plaintiffs' First Amendment rights at issue against the individual defendants. Because the plaintiffs have leave to refile Counts II and III against the United States once they exhaust their

administrative remedies, the remaining issues in Count I should be resolved with Counts II and III, if those counts are refiled. Accordingly, it is hereby

ORDERED that any further action on this Complaint be and is STAYED until further order of the Court.

The Clerk is directed to remove this civil action from the active docket of the court and forward copies of this Order to counsel of record.

Entered this 3rd day of February, 2006.

/s/

Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 1:04CV312

AYSHA NUDRAT UNUS AND HANAA UNUS, PLAINTIFFS,

V.

DAVID KANE, ET AL., DEFENDANTS.

Transcript of Motions Hearing
Before the Honorable Leonie M. Brinkema
United States District Judge

Alexandria, Virginia
November 2, 2007
10:30 a.m.

APPEARANCES:

FOR THE PLAINTIFFS:

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PROCEEDINGS

THE CLERK: Civil Action No. 04-312, Aysha Nudrat Unus, et al. v. United States of America. Counsel, please note their appearances for the record.

THE COURT: All right, counsel, you need to put your names on the record.

MS. BAKER: Good morning, your Honor. Mitka Baker and Steven Barentzen and Nancy Luque for plaintiffs, Aysha and Hanaa Unus.

THE COURT: Good morning.

MR. BARENTZEN: Good morning, Your Honor.

MR. SHER: Good morning, Your Honor. Assistant U.S. Attorneys Joseph Sher and Dennis Barghaan for the United States.

THE COURT: All right. This matter comes on the defendants' motion for summary judgment. There are other motions also dealing with the discovery types of issues, but frankly, the summary judgment motion is the critical motion in the Court's view.

I have reviewed the discovery issues to a certain degree, and I'm satisfied that they do not need to be responded to or resolved in order to address the summary judgment motion, and therefore, we're going to address that.

You've also filed extensive briefs, several inches of exhibits, including the deposition testimony of the two plaintiffs, most if not all of the officers who were

on the search, including Agent McMahon — I believe that's her name — who was the officer in charge of the search itself, and therefore, the Court finds that it has a complete record upon which to evaluate the issues raised in the summary judgment motion, and I'm not going to hear an extensive amount of argument, because, as I've said, you've had plenty of time to thoroughly address these issues.

So what I want — and I assume, Mr. Barentzen, you're going to be the spokesperson on the summary judgment motion?

MR. BARENTZEN: That's correct, Your Honor.

THE COURT: All right. What I want you to — I want to give you the opportunity to highlight for the Court where you think there remains at this point a clash of the evidence as to any material issue in this case. And I say material. I understand that there are differences as to versions of particular facts or incidents, but that's not the point for summary judgment analysis. It's where is there a dispute of material fact.

So if you would go up to the lectern and let me know where you think there is a dispute still remaining in this case.

MR. BARENTZEN: I think, Your Honor, the first thing that we need to, to look at is whether there is any basis for the defendants/agents' seizure of the plaintiffs in this case.

THE COURT: That's a legal argument. What I'm asking you first and foremost is where — having

evaluated the record that's been developed to date — and again, all the key players, the key witnesses have testified, have been fully deposed — where is there a clash of the material facts in this case, if any?

Because frankly, I don't think that there is a clash in the evidence. In other words, I think the evidence, all the material facts are really uncontested, and the question that really remains for the Court is to, taking those facts and applying the appropriate law, determine whether or not the defendants are entitled to judgment as a matter of law on this factual record.

That, I think, is really the issue, and so I'm asking you if you think from the plaintiffs' standpoint there is a clash, a material clash of the evidence, and if so, you need to articulate that for me at this point.

MR. BARENTZEN: Right. I think the first, the first factual question is was there reasonable suspicion to seize the plaintiffs. Is there any evidence in the record that says so? I mean, we certainly, our position is there's no evidence of it.

THE COURT: All right.

MR. BARENTZEN: I'm assuming that the defendants' position, although it's not in the papers, is that there is — that there is some basis for having done that, and that's the first issue of fact that we need to look at.

I think once you get beyond that, I mean, if there were some basis to seize the plaintiffs, and there's none in the record, the next question would be is

there an issue, a factual issue of reasonableness of any officer safety concerns on the day of the search, and again, we say that absolutely none. There's a dispute over that. There's no legitimate officer safety concerns on the day of the search.

THE COURT: All right.

MR. BARENTZEN: So those are the two big factual issues that are in dispute here.

THE COURT: Again, I actually see those as conclusions, but let me tell you where I'm going with this, all right? Again, I've reviewed this evidence carefully, and I'm going to start with the evidence coming from Hanaa Unus — I'm sorry, from Mrs. Unus herself.

All right. It is undisputed — and tell me as I go through the facts that I'm finding right now for the record, if you disagree with the factual finding, then I want you to tell me you disagree and give me the basis for the disagreement.

On the day in question, the agents had search warrants that had been authorized by a federal magistrate judge who had found probable cause to authorize a search for documents in connection with what the government was characterizing as a terrorism financing operation. There were multiple residences and business locations that were going to be searched as a part of this overall operation.

There was a search warrant, as I said, for the home. It was a daytime search warrant, and the agents went to the home, a group of various federal

agents, and there were at some point some uniformed police officers present in the overall search team.

The first group of agents who went to the door knocked on the door and announced or yelled in a loud voice words to some effect. Whether it was, "Open the door, Police," whatever, they knocked and announced a presence.

MR. BARENTZEN: Well, there's certainly a dispute over —

THE COURT: There's no dispute that they knocked, because Mrs. Unus and her daughter both have said they heard loud banging —

MR. BARENTZEN: Well, it was more of a pound than a knock, but there was obviously some kind of, you know, loud pounding on the door.

THE COURT: Correct.

MR. BARENTZEN: The extent of what was said is in "dispute." The extent of how long that went on for is in dispute.

THE COURT: I understand, but the term is not just dispute. You have to have a material dispute to survive summary judgment.

Now, Mrs. Unus testified on page 50 of her deposition that she was carrying a bowl and she was in the back of the house when she heard a loud noise on the door and she started to approach the door. She also said she heard the words, "Open the door."

She approached the door at some point close enough to be able to look out of one of the side windows. She saw some people, and she said she saw a gun. She said she stood there a second. She heard a noise again. She then went back.

At some point, she calls her daughter, Hanaa, who was upstairs apparently sleeping or waking up at that point, because Hanaa later testifies that the noise that she heard was so loud, it woke her up, and Hanaa comes down the stairs. There's some brief conversation, because Mrs. Unus asks her daughter to call the police, call 911, and there is evidence in the record that I don't think is contested that Hanaa picks up a phone and starts to dial 911.

By my count, it appears as though there were at least three rounds of knocking. If you look at Mrs. Unus's testimony, she indicates if you look at it that there was a knock, she's moving, knock, she sees them, knock, she calls her daughter.

Regardless of whether there's one, two, or three knocks, there is no question in this record that both Mrs. Unus and her daughter have testified that they heard very loud knocking on the door, that they were, clearly heard the words, "Open the door."

Whether they heard, "Police officers, open the door," is not uncontested in the record — I mean, it's not established clearly in the record. The agents say that they did announce police presence. I don't think the plaintiffs have acknowledged that, but there's no question that police were knocking on the door before they made entry.

There's also no question on this evidence that the officers saw Mrs. Unus approach the door and then saw her leaving the door.

MR. BARENTZEN: Well, that's — Your Honor, that is absolutely in dispute. That's the testimony — that's the self-serving testimony of the agents themselves.

THE COURT: Mr. Barentzen, your client, Mrs. Unus, testified that she went close enough to the window to the side of the door to be able to see people and a gun.

MR. BARENTZEN: A gun pressed against the glass. There was a shade covering that window.

THE COURT: I understand that, but she also saw people. Whether — she couldn't say if they were men or women, I don't think she said anything about a uniform, but she saw a group of people and a gun. Now —

MR. BARENTZEN: Just because you can see — Your Honor, just because — this is an important point. Just because you can see out the window, the sun is coming in from behind the house. I mean, we've — I personally haven't been there, but I have spoken to someone who's been at that site at around that same time, and just because you could see out, you could see a shadow, you could see something outside the house through the curtain, you could see a gun pressed against the glass, does not mean that you can see into the house with any kind of specificity whatsoever.

THE COURT: That's pure hypothesis. We're looking at evidence now. You have this evidence. You have the officers saying they saw Mrs. Unus. So they say it, and she says she saw them. That's it. There's no dispute in that evidence.

So I'm finding that the officers did, in fact, the officers who were at the door trying to gain entrance observed one of the occupants of the home approach the door and then leave, and the door was not promptly answered after several seconds of knocking and announcing their presence.

Now, that gave the officers an absolute in the eyes of all law, the right to gain forcible entry into the home. Once they got into the home, that particular set of facts, the fact No. 1, that the search warrant was being executed in the context of a case in which there was probable cause to believe a connection of the contents of the home with possible funding of terrorism activity; two, the officers had knocked and announced, but the door had not been promptly opened; and three, they had seen the presence of an individual within the home who had approached the door and not responded but, in fact, retreated.

MR. BARENTZEN: Your Honor, the evidence of terrorism financing is a complete red herring here. There's no —

THE COURT: Are you saying that that's not included within the papers supporting the search warrant and affidavit?

MR. BARENTZEN: What I'm saying is at the Unus home, there was no evidence of any criminal activity whatsoever. I mean, there was no reason to believe anyone that was going to currently be there at the time or that lived in the house had engaged in any criminal activity.

I mean, at the most, at the most — and you've found this — there was probable cause that there might be evidence of some kind of terrorism financing activity of other activities.

So looking at the evidence as a whole, it's — you need to look at what was going on at that house, not at this investigation, you know, this purported investigation as a whole.

THE COURT: No, Mr. Barentzen, that's part of the res gestae. You're looking — remember — and you had a problem — I've looked at the way you asked your questions in the deposition. You either don't understand or are unwilling to admit that the legal standard in this type of case, the court is looking at the perspective not of the plaintiffs; at the perspective of the police officers who are taking action.

You look at what the officers knew at the time they made the decisions to act as they did. You don't look at after-the-fact information.

And so whether or not the occupants of this home themselves were directly involved in anything is irrelevant. They had a search warrant to search that home for a type of evidence connected to certain type

of criminal activity. That's what the officers know.

Now, I agree with you —

MR. BARENTZEN: But even officers themselves testified that that was not something that raised the risk of this. No one was concerned about that other than, you know, Ms. McMahon after the fact.

THE COURT: No, no.

MR. BARENTZEN: The nature of the evidence that you're searching for when you're searching for these documents, the fact that it's related to, you know, terrorism financing, that does nothing to justify the actions, and the agents created this unsafe situation themselves by handling the entry improperly.

THE COURT: Mr. Barentzen —

MR. BARENTZEN: There's no warrant —

THE COURT: Mr. Barentzen, excuse me, there was a search warrant that allowed them to enter the home. It is uncontested on this record that the door was not answered and that the agents spent time pounding.

MR. BARENTZEN: They didn't identify themselves. They didn't have the warrant. The woman — Ms. McMahon, who's supposed to have the warrant, was nowhere to be seen.

THE COURT: Excuse me, we're going to go through this right now, and if you're going to

interrupt me this way, we're not going to have much more of a hearing.

MR. BARENTZEN: Well —

THE COURT: The agents don't have to have the warrant. The person who goes through the door first — and this was, I think, done in the papers very well — as long as at some point the warrant is shown to the occupants of the home — and it was done in this case — the fact that the first person through the door doesn't have the warrant in his or her hand, there's no federal case law that supports your view in that respect that that's somehow a violation of the law, but I'm going to move on.

MR. BARENTZEN: They were shown the warrant much, much later.

THE COURT: When the agents get into the home in those first minute or two as they enter the home, the actions that they took are completely justified in the Court's view, and they had a reasonable basis to do what they did, and what they did was standard operating procedure in almost any law enforcement situation and certainly is up to the discretion of the officers at the scene.

Unlike the very few cases that you pointed to where there was a finding of excessive force, in at least two of them, the people were forced to lie face down on the ground cuffed behind themselves, nothing like that happened in this case.

Mrs. Unus was — she was cuffed behind her back and allowed to immediately sit down on a piece of

furniture, I think it was the sofa, but a piece of furniture in her room. Her daughter, who was using a telephone — and again, at that moment as they enter the apartment — or the house, the officers have no idea of who she is calling, so they asked —

MR. BARENTZEN: Why does that matter?

THE COURT: Because she could have been calling a codefendant. She could have been calling somebody to come to the house and help them out. They don't know, but telling —

MR. BARENTZEN: A codefendant?

THE COURT: Excuse me. Telling her that she should drop the phone and get to the ground was again, in my view, not an unreasonable police approach given again the fact that the door had not immediately been opened and there had been this activity that they'd seen in the room.

On that fact pattern, therefore, I don't think any of the initial activity in terms of the cuffing of the plaintiffs was unreasonable under the circumstances.

MR. BARENTZEN: Your Honor —

THE COURT: Now, once the daughter was cuffed, the only additional physical act that was taken against her is that she was sitting on the floor. They got her up to her feet and put her on a chair.

Now, if they had left her sitting on a hard floor, I think that would have been far more degrading and uncomfortable than pulling her up and putting her on

a chair. There might have been other ways of doing it, but that one act in and of itself, in my view, given the context that this happens in the very first moments after the home is entered, is not itself unreasonable and would not amount to the kind of assault or battery that you have alleged in this case.

MR. BARENTZEN: I think it's —

THE COURT: And the rest of the evidence in the case shows that every time the plaintiffs complained of something, they had a reasonable response to it.

Again, in one of the cases you cited, the male who had been restrained during the search wanted to use the bathroom and was not allowed to do so. In one of the cases you showed the Court in your papers, the — one of the people who was restrained, I think, had cerebral palsy and was found lying in his bed in just his underwear.

I mean, you have such egregious facts in the very few cases that you cite to the Court where courts have found that the manner of restraint of persons within a home that's being searched amounted to a violation of their rights, there's nothing like that that happened here. The evidence is that as the search went on, eventually the plaintiffs were cuffed to the front and finally were uncuffed.

The plaintiff Mrs. Unus, when she needed to use the restroom, was allowed to go to the bathroom. She was given water. She was asked about her medical condition when she told the agents that she was diabetic.

In other words, it wasn't pleasant for the plaintiffs, I understand that, but in terms of whether the conduct of these officers under the facts presented to them at the time were unreasonable and beyond the scope of proper law enforcement conduct, it's just not in this record.

And you argue a lot, but you've not pointed the Court, in my view, to any area where the evidence is, again as to material facts, is in any kind of a clash or dispute.

MR. BARENTZEN: I think you underestimate the lifting of — first, I mean, there are several things I disagree with, but I think first of all, you underestimate the lifting of Hanaa in handcuffs behind her back physically off the floor — she's a small woman — by a large man and tossing her onto the couch. I mean, how that is conceivably reasonable or justified —

THE COURT: Well, I did not see any evidence of a tossing. I didn't see anyone say she was tossed.

MR. BARENTZEN: Her testimony is in our summary judgment motion. I can pull it up right now. I mean, absolutely, Your Honor. I mean, the government, of course, doesn't even address it in their briefs, because they'd like to pretend it didn't happen, but that's exactly what happened.

THE COURT: All right.

MR. BARENTZEN: In addition, Your Honor, I mean, before we even get to that, though, I mean, they were arrested. Mrs. Unus, which these are more

fact that we sort of haven't talked about, she was in addition to being put in handcuffs, she was patted down, frisked; she was read her rights; she was arrested.

You can't arrest somebody — there's no probable cause to arrest her. There was no reasonable suspicion to arrest her.

THE COURT: No, no. It was at most a *Terry* stop. Now, the case law is clear.

MR. BARENTZEN: A *Terry* stop, you need a reasonable suspicion of criminal activity afoot. Where is it?

THE COURT: No. *Summers* and the other lines of cases make it clear that in the course of executing a search warrant —

MR. BARENTZEN: For contraband, for contraband.

THE COURT: In the course of executing a search warrant for which there is probable cause to believe that there will be evidence of criminal activity in the residence, officers may take such reasonable steps as are necessary to ensure, No. 1, that the object of the search is properly protected, which means you don't want the occupants in the home to be free to run around and possibly destroy evidence. Officer safety is always a factor.

Now, after-the-fact vision is wonderful, but you would be naive and a court would be naive to believe that a police officer when he enters someone's home

is not at risk and believes himself or herself to be at risk until they have more information. The simple fact is the most benign encounters for police officers can sometimes result in terribly serious consequences to the officer. You stop somebody on a routine traffic case, and you get blown away.

Police know that, and the courts recognize that, which is why there is this reasonableness standard and why what the courts are to do is to look at the situation through the eyes of the officers having to make those decisions at that time.

And again, whether you like it or not, the facts of this particular case, the way in which the entry had to be made and the information first presented to these officers fully justified them, especially in the first few minutes of entering into the home, to make sure there was no one else in the home, to make sure that the women were not going to try to interfere with the search, to make sure that they weren't going to attack the officers.

And just because somebody is a female or diminutive — a small-statured female doesn't mean they can't get upset and fly at an officer.

MR. BARENTZEN: Your Honor — and there's two things here. One, the situation, any dangerous situation was created by the actions of the agents, not by the plaintiffs. They, they created the problem.

THE COURT: How do the agents create the problem here when —

MR. BARENTZEN: When you've got a botched

search. When you've got Mr. Oland, a big guy, pounding on the door, saying, "Open the door," and they create a chaotic situation in the house.

THE COURT: It's funny, as I read your questioning in some of these depositions — and I, quite frankly, think the government exercised great restraint in not getting rather frustrated — it almost sounded as though you expected the police with a search warrant to ring the doorbell.

MR. BARENTZEN: That's what the regulations say.

THE COURT: No, you don' t —

MR. BARENTZEN: You're supposed to ask for your entry. At none of the other places did this happen, Your Honor.

But more importantly, if you're going to, if you're going to rule that on a search for evidence, that there is some kind of inherent right to seize people without any kind of probable cause or reasonable suspicion, you're going to be the first court to do that.

The *Summers* case is a search for contraband, and it was specifically on its own language limited to contraband. The *Muehler v. Mena* case, also cited, contraband case.

Every one of those cases, every single one of them in which agents executing a search warrant had some kind of right to handcuff and seize an individual, it was inherent only because there was contraband. The reason for that is the presence of contraband in the

residence, in the business, gives the officers a reasonable suspicion that any occupant in there is associated with that and may be involved in the criminal activity.

The fact that there's no contraband, they're not looking for contraband, no one is, there's no evidence of any criminal activity in this house, you just can't — there's no law, no case which says that the arrest that occurred was legal. You can't get beyond that fact.

THE COURT: It is hard to know what would have happened — and this is the problem with hindsight — it is difficult to know what would have happened if when the officer first pounds the door or knocks on the door, Mrs. Unus had opened it. Had that happened, this might have been a very different scenario, but that's not what happened.

What happened was they knocked on the door, and not only was the door not opened, but they could see back and forth — not back and forth, they could see movement. Mrs. Unus approached the door and then did not respond to the opening of the door.

MR. BARENTZEN: But —

THE COURT: And, Mr. Barentzen, you've argued, and your clients should feel very satisfied you have been as vigorous and diligent as possible, but I'm going to end this discussion, because we're not getting very far.

I am satisfied, No. 1, you have, in my view, the four cases that were cited of examples of where courts

did find that it was improper seizure of the persons within the residence, the fact patterns are completely different and are absolutely egregious fact patterns. We don't have anything like that in this case.

MR. BARENTZEN: Those were all arrest warrant cases — or searches for contraband.

THE COURT: Well, you cited them. You're the one — I'm looking at the cases you gave the Court as examples of where courts have found excessive use of force or assault or battery in the context of the restraint of individuals in their homes, and they, as I said, are situations where people were forced to lie face down on the floor, with their hands behind them.

In this case, although there were — both plaintiffs were handcuffed for a period of time behind their backs, they were also sitting on furniture in their living room, and again, as soon as Mrs. Unus complained about her cuffs, there was some adjustment made, maybe not the full adjustment you would have liked, but I don't find that the way in which the gradual easing of restraint in this case was inherently unreasonable given all of the factors involved, in particular, however, the way in which the first entry occurred.

So I am granting summary judgment for the defendants. That moots any issue about the relation back business and the whether or not any of the individual defendants should be in this case, because the evidence that you've been able to develop, in my view, clearly does not create any material dispute of fact, nor does it support that judgment should go in

the plaintiffs' favor in this case, because I find that the activities of the officers were reasonable under the circumstances known to the officers at the time they took their action.

This will also — this ruling today moots the discovery issues that are still out there, and obviously, you can appeal this decision, and your time to appeal would begin today.

Thank you. We'll recess court for the day.

(Which were all the proceedings had at this time.)

CERTIFICATE OF THE REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.

_____

Anneliese J. Thomson

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NO. 1:04cv312 (LMB)

AYSHA NUDRAT UNUS AND HANAA UNUS, *ET AL.*,
PLAINTIFFS,

V.

DAVID KANE, *ET AL.*,
DEFENDANTS.

ORDER

For the reasons stated in open court, it is hereby

ORDERED that the defendants' Motion for Summary Judgment be and is GRANTED; and it is further

ORDERED that all pending motions in this action be and are DISMISSED AS MOOT.

The Clerk is directed to enter judgment in favor of the defendants pursuant to Fed. R. Civ. P. 58, terminate this civil action in its entirety, and forward copies of this Order to counsel of record.

Entered this 2nd day of November, 2007.

/s/

Leonie M. Brinkema
United States District Judge
Alexandria, Virginia

Supreme Court, U.S.
FILED
DEC 18 2009
OFFICE OF THE CLERK

No. 09-294

In the Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,
PETITIONERS

v.

DAVID KANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld summary judgment for the United States on petitioners' common law tort claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, because petitioners failed to establish that the federal agents acted unreasonably under Virginia law in their execution of a lawful search warrant at petitioners' home.

2. Whether the court of appeals erred in applying the FTCA's judgment bar—which provides that a judgment in an action under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim," 28 U.S.C. 2676—to preclude *Bivens* claims that had been brought together in the same lawsuit as the FTCA claim, an argument petitioners failed to raise before the court of appeals.

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In the Supreme Court of the United States

No. 09-294

AYSHA NUDRAT UNUS AND HANAA UNUS, PETITIONERS

v.

DAVID KANE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 565 F.3d 103. The opinions of the district court (Pet. App. 57a-78a, 79a-80a, 81a-102a, 103a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2009. On July 27, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides a limited waiver of sover-

eign immunity for claims against the federal government based on "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b)(1). The FTCA permits suit against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). See 28 U.S.C. 2674 (making United States liable "in the same manner and to the same extent as a private individual under like circumstances").

The FTCA places a variety of limits on the United States' waiver of its immunity. For example, the FTCA excludes from the waiver of immunity claims arising out of the exercise of a discretionary function. 28 U.S.C. 2680(a). In addition, the FTCA's judgment bar, 28 U.S.C. 2676, protects the government from the need to defend multiple actions against itself and the federal employee whose acts gave rise to the injury. The FTCA's judgment bar provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." *Ibid.*

In 1988, Congress enacted the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), Pub. L. No. 100-694, 102 Stat. 4563, which makes an action against the United States under the FTCA the plaintiff's sole remedy for most claims. 28 U.S.C. 2679(b)(1). If the plaintiff sues a federal employee for acts within the scope of his employment, the United States is substituted as the defendant and the suit proceeds as one under the FTCA. 28 U.S.C.

2679(d)(1). Congress made an exception to the Westfall Act's exclusivity and substitution provisions for claims against employees for violating the Constitution. 28 U.S.C. 2679(b)(2)(A). The FTCA's judgment bar, however, contains no such exception.

2. In March 2002, as a part of an extensive, multi-agency investigation of a group of organizations and persons suspected of supporting international terrorism, federal investigators obtained a search warrant for a number of locations, including the home of Dr. Iqbal Unus. Pet. App. 3a. The affidavit supporting the warrant explained that many of the organizations had overlapping leadership comprised of persons suspected of supporting terrorism. *Id.* at 7a. The affidavit detailed transactions among the organizations, including entities in which Dr. Unus held positions, which seemed to serve no logical business or charitable purpose, and it explained that efforts to trace the funds through overseas transactions had met a dead end. *Id.* at 6a-8a. The warrant authorized agents to seize from Dr. Unus's home certain items that might be evidence of money laundering, tax evasion and extending material support to terrorists abroad. *Id.* at 9a.

Federal agents arrived at Dr. Unus's home to execute the warrant at approximately 10:30 a.m. Pet. App. 9a. The lead agent pounded on the front door and ordered the occupants to open it. *Ibid.* Petitioner Aysha Unus (Dr. Unus's wife) was in the living room at the rear of the house, and petitioner Hanaa Unus (one of the Unus's daughters) was sleeping upstairs. *Ibid.* Aysha Unus heard the pounding on the door and a voice ordering her to open it. *Ibid.* She moved toward the door, coming within about 15 feet of it, and saw a gun through a side window. *Ibid.* The agents saw her through the

side window come toward the door and then, in response to the demand that she open the door, "run 'down the hallway to the back of the house'" without opening it. *Id.* at 27a.

Aysha Unus began screaming for Hanaa Unus and moved toward a door at the back of the house. Pet. App. 10a. Hanaa Unus came down the stairs and joined Aysha Unus at the back of the house, where they began to place a phone call. *Ibid.* The agents then broke down the front door with a battering ram. *Ibid.* The agents came into the room, at least one with a gun drawn, and ordered the women to drop the phone and put their hands up. *Ibid.* The agents encountered "hectic conditions" on entry; there was "'excitement' in [petitioners'] voices, and [petitioners] were 'clearly concerned and worried and agitated,'" to the extent that their behavior suggested to the agents that there was some "possibility that [petitioners] would take some action that would make an unstable situation." *Id.* at 32a. The agents ordered petitioners to sit on couches in the living room and handcuffed them with their hands behind their backs. *Id.* at 10a.

The agents then began to search the premises. During the search, petitioners remained handcuffed for nearly four hours. Pet. App. 32a. The agents "reassessed the situation as the search progressed," moving the handcuffs to the front to make petitioners more comfortable, allowing them to use the restroom, and allowing Aysha Unus to self-administer her diabetes medication. *Id.* at 10a, 33a. Around 2 p.m., petitioners informed the officers that they were obliged to perform afternoon prayers, in accordance with their Muslim faith. *Ibid.* An agent removed their handcuffs, allowing them to perform their prayers. *Ibid.* The agents did

not allow petitioners to pray outside of the presence of male agents, or allow petitioners to wear head scarves or cover their hands while the male agents were present, or while being photographed. *Id.* at 11a. After petitioners concluded their prayers, they were not handcuffed again, but remained confined to the living room for the duration of the search. *Ibid.* At the conclusion of the search, the agents left petitioners with a copy of the warrant and a written inventory of the items seized. *Ibid.*

3. Petitioners brought suit against the agents, asserting claims for common law torts of assault-and-battery and false imprisonment as well as constitutional claims under *Bivens* v. *Six Unknown Named Federal Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 389 (1971), for asserted violations of petitioners' rights under the First and Fourth Amendments to the United States Constitution. Pet. App. 11a-13a.[1] The United States was substituted as defendant on the common law tort claims. *Id.* at 18a. Those claims were initially dismissed for failure to exhaust administrative remedies; after exhausting those remedies, petitioners refiled their claims under the FTCA as part of an amended complaint. *Id.* at 18a-20a.

On February 3, 2006, the district court dismissed petitioners' Fourth Amendment *Bivens* claim on the ground that the individual defendants were entitled to qualified immunity. Pet. App. 73a-74a, 76a. The court held that it was not clearly established that the agents' conduct in detaining and handcuffing petitioners during the execu-

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[1] Petitioners also sued the agent whose affidavit supported the search warrant and another individual who had provided information in support of the affidavit. Pet. App. 5a, 12a-13a. Those claims were dismissed, *id.* at 13a-15a, and are not at issue in the petition.

tion of the search warrant would violate petitioners' constitutional rights. *Id.* at 73a-74a. The court later dismissed petitioners' First Amendment *Bivens* claims on statute of limitations grounds. See *id.* at 20a.

On November 2, 2007, the district court granted summary judgment in favor of the United States on petitioners' FTCA tort claims. Pet. App. 81a-103a. The court explained that there was no genuine issue of material fact with regard to the reasonableness of the federal agents' actions during the search, and that summary judgment was therefore appropriate. *Id.* at 97a-98a, 101a-102a. After holding for the United States on the FTCA claims, the court denied petitioners' motion to reconsider the dismissal of petitioners' First Amendment *Bivens* claims on statute of limitations grounds. The court concluded that its grant of summary judgment to the United States on the FTCA claims "moot[ed] any issue * * * whether or not any of the individual defendants should be in this case." *Id.* at 101a.

4. The court of appeals affirmed. Pet. App. 1a-56a. As relevant here, petitioners argued that the district court erred in granting summary judgment to the United States on their FTCA claims for assault-and-battery and false imprisonment, and that the judgment bar did not apply to their First Amendment *Bivens* claim because that claim did not arise out of the same subject matter as their FTCA claims. The court of appeals rejected those arguments.

The court observed that petitioners' FTCA claims were governed by "the substantive law of the state where the alleged tort took place: in this case, the law of the Commonwealth of Virginia." Pet. App. 24a. The court determined that, under Virginia law, petitioners' false imprisonment and assault and battery claims would

each fail if the restraint on liberty or unwanted touching was legally justified. *Id.* at 24a-25a. Police officers' use of force or restraint is justified, under state law, if "reasonable" in "execut[ing] their lawful duties." *Id.* at 25a. Thus, the court characterized the central question as whether "the federal agent defendants acted reasonably under Virginia law." *Ibid.*

The court noted that, in a criminal case, the Virginia Supreme Court had stated that an "officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia." *Ibid.* (quoting *Lewis* v. *Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997)). Noting the priority of officer safety under Virginia law, *id.* at 26a, the court concluded that the federal agents acted reasonably in the execution of the search warrant. The court observed that the agents "were executing a facially valid search warrant" that authorized them to search for financial documents relating to financing of international terrorism. *Id.* at 30a-31a. The Court also concluded that, even though they were "searching for financial documents only," the agents acted reasonably in handcuffing petitioners for a period of slightly less than four hours during the search because the search was being conducted "at a residence believed to contain evidence of money laundering by entities suspected of assisting international terrorism," where, "[v]iewed objectively, [they] did not know whether they would be confronted by resistance," and because they encountered "hectic conditions" upon entry that suggested that there was a "possibility that [petitioners] would take some action that would make an unstable situation." *Id.* at 31a-32a.

Finally, the court rejected petitioners' argument that the FTCA judgment bar did not preclude their *Bivens* claims because those claims "are predicated on different conduct and allege distinct injuries from the FTCA claims." Pet. App. 35a. The court rejected that narrow construction of the judgment bar, holding that it precludes all *Bivens* claims "arising out of the same actions, transactions, or occurrences" as the FTCA claim. *Ibid.* (quoting *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840, 858 (10th Cir. 2005)). The court explained that the FTCA claims and *Bivens* claims "arose out of the 'same subject matter' * * * —the execution of the Warrant—by the 'employee of the government whose act or omission gave rise to the claim.'" *Id.* at 36a (citation omitted). The FTCA judgment therefore barred petitioners' *Bivens* claims based on the execution of the warrant. *Ibid.*

ARGUMENT

Petitioners ask this Court (Pet. 9-21) to determine whether the federal agents' conduct in executing the search warrant violated petitioners' Fourth Amendment rights. That issue is not directly presented here. The court of appeals addressed whether "the federal agent defendants acted reasonably under Virginia law," Pet. App. 25a, a question of state law that does not warrant this Court's review. The court of appeals' consideration of the Fourth Amendment was subsumed entirely in resolving the reasonableness of the agents' actions under state law. The court's analysis of that question was correct and does not conflict with any decision of this Court or another court of appeals. Petitioners also seek this Court's review (Pet. 21-25) of the question whether the judgment on an FTCA claim can bar a *Bivens* claim

asserted within the same suit. Petitioners did not raise that argument in the court of appeals and should not be permitted to raise it for the first time before this Court. In any event, the court of appeals' application of the judgment bar is correct, and petitioners overstate the extent of any circuit conflict. Review by this Court is therefore unwarranted.

1. Petitioners mischaracterize the court of appeals as having ruled, "[w]ith respect to petitioners' Fourth Amendment claim," that the federal agents' actions were constitutional. Pet. 5. The court of appeals did not rule on the merits of petitioners' Fourth Amendment claim, which was asserted only against the individual agents, holding instead that that claim was precluded by the FTCA's judgment bar. Pet. App. 36a. The part of the court of appeals' decision cited by petitioners as addressing their "Fourth Amendment claim," see Pet. 5-7 (quoting Pet. App. 30a-33a), was in fact an analysis of petitioners' "false imprisonment and battery claims," Pet. App. 28a, under Virginia law, as made applicable under the FTCA, *id.* at 24a-25a. The court of appeals' resolution of that state law question was correct and does not warrant this Court's review.

a. Because the FTCA makes the United States' liability turn on "the law of the place where the act or omission occurred," 28 U.S.C. 1346(b)(1), the relevant question is whether "local law would make a 'private person' liable in tort." *United States* v. *Olson*, 546 U.S. 43, 44 (2005) (quoting 28 U.S.C. 1346(b)(1) (emphasis omitted)). See *Richards* v. *United States*, 369 U.S. 1, 5, 11 (1962) (United States' liability under the FTCA turns on state tort law). Consistent with that principle, the court of appeals correctly recognized that petitioners' false imprisonment and assault and battery claims were gov-

erned by "the substantive law of * * * the Commonwealth of Virginia." Pet. App. 24a. Under Virginia law, it is neither false imprisonment nor assault or battery for a police officer to restrain one's liberty or engage in unwanted touching if the officer's conduct was legally justified. *Id.* at 24a-25a (citing *Jordan* v. *Shands*, 500 S.E.2d 215, 218 (Va. 1998), and *Koffman* v. *Garnett*, 574 S.E.2d 258, 261 (Va. 2003)). Because police officers' use of force or restraint is justified, under Virginia law, if "reasonable" in "execut[ing] their lawful duties," *id.* at 25a, the court correctly characterized the central question in petitioners' appeal as whether "the federal agent defendants acted reasonably under Virginia law," *ibid.*

The court of appeals' discussion of this Court's Fourth Amendment precedent, see Pet. App. 28a-33a, took place entirely within this framework of Virginia's common law torts of false imprisonment and battery, *id.* at 28a. While the court of appeals noted that, in a criminal case, the Virginia Supreme Court had stated that an "officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia," Pet. App. 25a (quoting *Lewis* v. *Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997)), that does not transform the legal question whether "the federal agent defendants acted reasonably under Virginia law," *ibid.*, into a question of federal constitutional law that this Court should review. Notably, the court of appeals began its analysis of the state-law reasonableness inquiry with the premise "that Virginia has recognized that 'the safety of the officer when conducting his duties is of paramount importance,'" *id.* at 26a (quoting *Harris* v. *Commonwealth*, 400 S.E.2d 191, 194 (Va. 1991)). Likewise,

in assessing the reasonableness of the agents' actions in forcing entry into petitioners' home with respect to that aspect of petitioners' assault claim, the court again relied on Virginia law with respect to when such a forceful entry is reasonable. *Ibid.* (quoting *Lewis*, 493 S.E.2d at 399).

This Court does not generally review a federal court of appeal's determination of a question of state law. *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944); see Eugene Gressman et al., *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007). Although, in this case, the court of appeals looked to federal constitutional law as instructive of the state law inquiry of legal justification and reasonableness, Pet. App. 29a-31a, that discussion, as described above, was filtered through the lens of Virginia's emphasis on officer safety. Moreover, because the ultimate question is whether "the federal agents acted reasonably under Virginia law," *id.* at 25a, this Court would have to consider whether the officer's conduct, even if ultimately determined to have been unconstitutional, was nonetheless reasonable in light of the law as it existed at the time of their conduct. Notably, petitioners' arguments in support of certiorari (Pet. 10-13) rely heavily on an analysis of this Court's decision in *Muehler* v. *Mena*, 544 U.S. 93 (2005), a decision that post-dates the conduct at issue here by three years. As the district court observed in dismissing petitioners' Fourth Amendment *Bivens* claims, the agents reasonably believed their conduct was permissible at the time of their actions. Pet. App. 72a. In an analogous situation, the Ninth Circuit upheld dismissal of a plaintiff's FTCA false arrest claim under California law, even though the arrest was later determined to have violated the plaintiff's First Amendment rights, because the offi-

cer's conduct "was not a violation of clearly established law" at the time, *Galvin* v. *Hay*, 374 F.3d 739, 758 (2004), and the officers therefore "had reasonable cause to believe the arrest was lawful," *ibid.* (quoting Cal. Penal Code § 847(b)(1) (West 2008)).

Even if petitioners were correct that the court of appeals' analysis of *Muehler* was in tension with other courts of appeals, but see pp. 15-16, *infra*, the Court should address that issue in a case in which the Fourth Amendment question is cleanly presented, not where, as here, the Fourth Amendment is relevant only to the extent it sheds light on a question of state law—whether "the federal agent defendants acted reasonably under Virginia law" such that their actions were "justified" within the meaning of Virginia false imprisonment and battery law. Pet. App. 24a-25a.

b. The court of appeals' decision was, in any event, correct and does not, contrary to petitioners' contentions (Pet. 12-14, 16-21), conflict with this Court's decision in *Muehler* or decisions of the Ninth and Tenth circuits. Further review of the court of appeals' application of this Court's precedent to the particular facts of this case is not warranted.

i. The court of appeals correctly concluded that federal agents acted reasonably in detaining petitioners incident to the search of their residence for evidence related to a terrorism investigation and in handcuffing petitioners for slightly less than four hours. To the extent the Fourth Amendment was relevant to the availability of a cause of action under state law, the court of appeals recognized *Michigan* v. *Summers*, 452 U.S. 692 (1981), and *Muehler* v. *Mena*, 544 U.S. 93, 99-100 (2005), as the leading authorities and correctly observed that, under those decisions, the propriety of handcuffing indi-

viduals detained during a search depends on whether "the governmental interests" in handcuffing "outweigh the marginal intrusion" it imposes. Pet. App. 31a (quoting *Muehler*, 544 U.S. at 99-100); see *id.* at 29a ("[i]nherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention," including handcuffs) (quoting *Muehler*, 544 U.S. at 98-99).

The court of appeals concluded that, under the particular facts and circumstances of this case, the agents acted reasonably in detaining petitioners incident to the search and in imposing the additional intrusion of handcuffing them during part of the search. Although the agents were searching for "financial documents only—and not for either weapons or persons—a reasonable officer would have had legitimate safety concerns under the[] circumstances." Pet. App. 31a. The court noted that the agents were executing the warrant "at a residence believed to contain evidence of money laundering by entities suspected of assisting international terrorism," which meant that, "[v]iewed objectively, the agents did not know whether they would be confronted by resistance." *Id.* at 31a-32a. In that context, and in light of petitioners' "excitement" and "agitated" state when the agents entered the residence, the agents acted reasonably by initially handcuffing petitioners. *Id.* at 32a. Nor, in light of petitioners' behavior at the time of entry, did the officers act unreasonably in keeping petitioners in handcuffs while the agents executed the "terrorism-related warrant." *Ibid.* The court stressed that the agents had moved the handcuffs from the back to the front to make petitioners more comfortable and later, after reassessing the situation, removed the handcuffs entirely. *Id.* at 32a-33a.

Contrary to petitioners' arguments (Pet. 12), *Summers* and *Muehler* do not authorize restraint of an occupant during execution of a search warrant "only in the context of searches for contraband." Pet. 13. Although the facts of *Summers* and *Muehler* involved searches for contraband, they stand for the broader proposition that the governmental interests in detaining and handcuffing the occupants of a location while it is searched can, in appropriate circumstances, outweigh the intrusion on the individual's liberty. Neither decision holds that contraband searches are the *only* context in which such constraints are appropriate. While Justice Kennedy's concurring opinion observed that "police handcuffing during searches" should "become[] neither routine nor unduly prolonged," *Muehler*, 544 U.S. at 102, he recognized that concerns for officer safety, the risk of interference, and delay of the search are all relevant factors in assessing the reasonableness of the use of handcuffs. *Id.* at 103. Justice Kennedy urged that the passage of prolonged time "require[s] revisiting the necessity of handcuffing," *ibid.*, which is precisely what happened here, where petitioners were initially handcuffed behind their backs, later handcuffed in front, and later freed from handcuffs altogether when the agent in charge deemed the situation warranted it. Pet. App. 32a-33a.

Neither *Summers* nor *Muehler* precludes the possibility that significant governmental interests—such as guarding against potential dangers posed by the subject of the search's ties to violent terrorist organizations, or by the particular circumstances of resistance that the officers on the scene confront—might make it reasonable for agents to detain and handcuff the occupants of a house during the execution of a warrant. The court of

appeals' holding does not conflict with this Court's precedent, and no further review is warranted.

ii. For similar reasons, the court of appeals' decision also does not conflict with decisions of the Ninth and Tenth Circuits identified by petitioners. See Pet. 16-21 (citing cases). The subject-matter of the search of course is relevant to deciding whether the governmental interest in controlling the scene of the search through handcuffing the occupants of the search location outweighs the burdens imposed on those individuals. And, contrary to petitioners' arguments, the court of appeals in this case did not hold "that it made no difference that the officers were executing a warrant seeking financial records, as opposed to contraband," Pet. 21; rather, the court recognized the significance of the fact that the evidence the officers were seeking consisted of financial records related to "entities suspected of assisting international terrorism." Pet. App. 31a-32a. Petitioners disagree with the lower courts' conclusion that officers in the federal agents' situation would have reason to be concerned for their safety and their control of the search scene while executing a warrant relating to terrorism financing. But nothing in the decisions from the Ninth and Tenth Circuits upon which petitioners rely suggests that those courts would refuse to consider whether a search might, under particular circumstances, present a sufficient threat to governmental interests to justify detention and handcuffing even though the search was not for contraband. Like the Fourth Circuit, the Ninth and Tenth Circuits recognize that the reasonableness of detention pursuant to search, including handcuffing, must be assessed in light of the circumstances of the case. See *Tekle* v. *United States*, 511 F.3d 839, 849-850 (9th Cir. 2007); *Denver Justice & Peace Comm., Inc.* v.

City of Golden, 405 F.3d 923, 929, 929-931 (10th Cir. 2005), cert. dismissed, 546 U.S. 1146 (2006). Neither the Ninth nor the Tenth Circuit has addressed the reasonableness of handcuffing in circumstances such as those in this case. Nor is there any need for this Court to review the court of appeals' analysis of Fourth Amendment precedent on the particular facts of this case, particularly because the Fourth Amendment analysis was solely in aid of the ultimate question whether "the federal agent defendants acted reasonably under Virginia law." Pet. App. 25a.

2. Petitioners also contend (Pet. 21-25) that the court of appeals erred in "holding that the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit" as a claim against the United States under the FTCA. Pet. 22. See Pet. 24 (citing conflict regarding whether "the judgment bar applies to contemporaneous *Bivens* claims"). Petitioners did not raise that argument in the court of appeals. Review of petitioners' second question presented is therefore unwarranted. See *United States* v. *United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (petitioner should not be heard to "assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing").

A. Before the court of appeals, petitioners only challenged application of the judgment bar to their First Amendment claim, arguing that "[petitioners'] First Amendment claims do not relate to the 'same subject matter' as [petitioners'] common law claims that were dismissed on summary judgment." Appellants' Reply

Br. 4 (quoting 28 U.S.C. 2676).[2] Petitioners went on to argue that "[t]he subject matter of [petitioners'] First Amendment claims is violation of their rights to freely exercise their religion" in connection with their prayers, whereas "the subject matter of [petitioners'] common law claims [was] the agents' assault, battery and imprisonment of [petitioners] in handcuffs." *Ibid.* Because, petitioners maintained, the First Amendment claims stemmed from different "actions" and different "injuries," the judgment bar should not apply. *Ibid.* Petitioners did not contend, as they do in this Court, that the fact that the *Bivens* and FTCA claims were litigated in the same suit rendered the judgment bar inapplicable, Pet. 22.

The court of appeals addressed the argument petitioners advanced, *i.e.*, that their *Bivens* claims were "predicated on different conduct and allege distinct injuries from the FTCA claims," Pet. App. 35a, and properly rejected petitioners' attempt to narrow the reach of the judgment bar in that fashion. The court recognized that "[i]n order for § 2676 to have effect, it must encompass all of the claims that could have been brought with regard to the conduct at issue against the responsible 'employee of the government.'" *Ibid.* (quoting Section 2676); see *id.* at 34a-35a (*Bivens* claims are "by reason of the same subject matter" so long as they "aris[e] out of the same actions, transactions, or occurrences" as an FTCA claim). Because "the district court properly awarded summary judgment to the United States on the FTCA claims," and "[t]hose claims arose out of the 'same subject matter' as the * * * *Bivens* subclaims,"

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[2] Petitioners did not address the judgment bar in their opening Brief of Appellants.

the *Bivens* claims were precluded under Section 2676 by "the court's summary judgment award on the FTCA claims." *Id.* at 36a (quoting 28 U.S.C. 2676).

Petitioners do not contend that the court of appeals' holding with respect to the "same subject matter" requirement conflicts with any decision of this Court or of any other court of appeals. Rather, petitioners urge this Court to addresss a different issue, whether "the FTCA's judgment bar applies to the dismissal of individual claims in the *same* suit" or is instead "limited to the dismissal of FTCA claims in a separate action." Pet. 22. Petitioners urge that "[t]he Sixth and Seventh Circuits expressly rejected the Ninth Circuit's holding in *Kreines* [v. *United States*, 959 F.2d 834 (1992),] and found that the judgment bar applies to contemporaneous *Bivens* claims regardless of who prevails on the FTCA claim." Pet. 24. Notably, petitioners do not contend that the court of appeals' decision in this case expressly rejected *Kreines*, which petitioners' court of appeals briefs did not cite, or that the decision below even mentioned that purported circuit conflict. Petitioners should not be permitted to attack the court of appeals' decision in this Court based on a new argument that it failed to raise below.

B. In any event, the court of appeals was correct to apply the judgment bar in this case, even though the *Bivens* and FTCA claims were brought in the same suit, and there is no clear conflict among the courts of appeals on that issue that would warrant this Court's review even if the question were properly presented in this case.

i. The FTCA grew out of "a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."

Dalehite v. *United States*, 346 U.S. 15, 24 (1953), partially overruled on other grounds by *Rayonier Inc.* v. *United States*, 352 U.S. 315 (1957). Before the FTCA's enactment, parties injured by a government employee's actions were forced to seek relief through private bills in Congress, *ibid.*, or by suing the government employee in his individual capacity, *United States* v. *Gilman*, 347 U.S. 507, 511 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). Such suits constituted "a very real attack upon the morale of the services" because most government employees were "not in a position to stand or defend large damage suits." *Ibid.* They also represented a burden on government resources, because "the Government, through the Department of Justice, [was] constantly being called on * * * to go in and defend" federal employees from suit. *Ibid.*

Since the FTCA's enactment, the judgment bar has been an integral part of the statutory scheme. Section 2676 provides that "[t]he judgment in an action under [the FTCA] shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. In other words, once the FTCA action is the subject of a judgment, that judgment cuts off the claimant's ability to pursue relief against government employees individually. By enacting the FTCA, Congress offered plaintiffs the opportunity, subject to certain limits, to sue a financially responsible defendant. Through the judgment bar, Congress ensured that, if a claimant chose to pursue an FTCA action against the United States, the judgment in that suit would protect federal employees against the threat and distraction of litigation, and protect as well the government from having to expend its

resources defending against further litigation arising out of the same incident. See *Gilman*, 347 U.S. at 511 n.2.

Consistent with the provision's purposes, the courts of appeals have uniformly acknowledged that the judgment bar applies even when the plaintiff brings her claims against the United States and claims against the individual federal employee in a single lawsuit. Numerous courts had so recognized before enactment of the Westfall Act in 1988, when federal employees could still be sued for common law torts committed within the scope of their employment. See, *e.g.*, *Aetna Cas. & Sur. Co.* v. *United States*, 570 F.2d 1197, 1201 (4th Cir.) ("[A] judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [the government employees]."), cert. denied, 439 U.S. 821 (1978); *Gilman* v. *United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("[T]he moment judgment was entered against the Government, then by virtue of § 2676 * * * the employee [who had been impleaded] was no longer primarily answerable to the claimant,—he was not answerable at all."), aff'd, 347 U.S. 507 (1954); *United States* v. *Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of [Section 2676] order judgment against [the government employee] in favor of [the plaintiff] in the same action.").

The courts of appeals have continued to apply that rule after the Westfall Act's adoption. Although Congress excepted *Bivens* claims from the Westfall Act's exclusivity and substitution provisions, 28 U.S.C. 2679(b)(2)(A), it made no such exception to the judgment

bar, as to which Congress's concern about defending multiple claims against the United States and individual employee defendants remains the same. And the courts of appeals have continued to apply the judgment bar when plaintiffs join in a single suit their FTCA claims against the United States and *Bivens* claims against federal employees individually. See, *e.g.*, *Manning* v. *United States*, 546 F.3d 430 (7th Cir. 2008), cert. denied, 130 S. Ct. 552 (2009); *Harris* v. *United States*, 422 F.3d 322, 334 (6th Cir. 2005) ("In accordance with the consistent application of the judgment bar over the fifty years since its enactment, we have held that [Section 2676] applies even when the claims were tried together in the same suit.") (quotation marks and citation omitted); *Estate of Trentadue ex rel. Aguilar* v. *United States*, 397 F.3d 840 (10th Cir. 2005) (applying Section 2676 to bar a *Bivens* judgment entered prior to the FTCA judgment in the same suit); *Rodriguez* v. *Handy*, 873 F.2d 814, 816 (5th Cir. 1989) (holding that plaintiff's FTCA judgment against the United States barred his *Bivens* judgment in the same suit); see also *Denson* v. *United States*, 574 F.3d 1318, 1334 n.50 (11th Cir. 2009) (noting that "[a] majority of courts have construed § 2676 as barring a plaintiff's *Bivens* claims, irrespective of whether the Bivens and FTCA claims were brought in the same lawsuit").

ii. Petitioner contends (Pet. 22-23) that in *Kreines* v. *United States*, 959 F.2d 854 (1992), the Ninth Circuit departed from the consensus of the courts of appeals that an FTCA judgment bars *Bivens* claims brought in the same action. But the Ninth Circuit, like the other courts to consider the issue, has held that Section 2676 does apply when *Bivens* and FTCA claims are brought in the same action; at most, *Kreines* carved out an ex-

ception to that rule. And in any event, the reasoning behind *Kreines*'s exception is inconsistent with prior Ninth Circuit precedent and has been undermined by subsequent decisions of that court as well. That inconsistency, which amounts to an intra-circuit conflict within the Ninth Circuit, does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

As noted above, long before *Kreines*, the Ninth Circuit had recognized that an FTCA judgment bars a judgment against the federal employee even though the claims were brought simultaneously in the same suit. See *Arevalo* v. *Woods*, 811 F.2d 487, 490 (1987) ("The moment judgment was entered against the government, then by virtue of section 2676, [the federal employee] was no longer answerable to [plaintiff] for damages," though both claims were raised in a single action.); *Gilman*, 206 F.2d at 848 ("[T]he moment judgment was entered against the Government, then by virtue of § 2676 * * * the employee was no longer primarily answerable to the claimant,—he was not answerable at all.").

In *Kreines*, the panel acknowledged that *Arevalo* had held that, pursuant to Section 2676, an FTCA judgment "barred a contemporaneous *Bivens* judgment against a federal employee" in the same suit. *Kreines*, 959 F.2d at 838. The *Kreines* court established an exception to that rule, holding that when the government prevailed on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit. *Ibid.* The court reasoned that Section 2676 was "ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous *Bivens* judgment." *Ibid.* Because the

court viewed the primary purpose of Section 2676 was preventing dual recoveries arising from subsequent litigation, the court concluded that Section 2676 should not bar a contemporaneous *Bivens* recovery when the government prevailed on the plaintiff's FTCA claim.

Two years after *Kreines*, however, the Ninth Circuit limited *Kreines* to its facts and cast doubt on its reasoning. See *Gasho* v. *United States*, 39 F.3d 1420, 1437 (1994), cert. denied, 515 U.S. 1144 (1995). *Gasho* concerned the application of the judgment bar to a plaintiff's *Bivens* claims when the plaintiff had already brought and lost FTCA claims in a separate suit. The court held that "[t]he language [of Section 2676] is not 'ambiguous' or 'vague,'" and that—contrary to *Kreines*' reasoning—the provision's plain language dictated that the judgment bar should apply regardless of whether the plaintiff had prevailed or lost on the FTCA claims. *Ibid.* ("The statute speaks of 'judgment' and suggests no distinction between judgments favorable and judgments unfavorable to the government."). The court also cast doubt on *Kreines*'s reading of Section 2676's legislative history, concluding that because Congress was concerned not only with preventing dual recoveries, but also with protecting the government's resources in defending itself and its employees, the concerns animating the judgment bar are implicated even when there is no double recovery. *Ibid.* Thus, although *Gasho* concerned the application of Section 2676 to a subsequent suit, rather than to claims within a single suit (as in *Kreines*), *Gasho* casts doubt on the validity of *Kreines*'s reasoning that Section 2676 is ambiguous and that its application within a single suit should depend on whether the FTCA judgment was favorable or unfavorable to the plaintiff.

In light of *Gasho*, and given that the Ninth Circuit has not applied *Kreines*'s holding in any subsequent decision, it is entirely possible that the Ninth Circuit will reconsider its position should the opportunity arise. That is particularly so given the consensus that has broadened since *Kreines* was decided, to the effect that Section 2676 applies to claims in "any action," regardless of whether the claims are brought within one action or the plaintiff prevailed on the FTCA claims.

The Court recently denied a petition for certiorari raising the same issue as the second question presented by petitioners. See *Manning* v. *United States*, 130 S. Ct. 552 (2009). There is no reason for a different result in this case, especially because petitioners failed to raise the issue before the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AYSHA NUDRAT UNUS AND HANAA UNUS,

Petitioners,

v.

ROGER AARONS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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IN THE

Supreme Court of the United States

AYSHA NUDRAT UNUS AND HANAA UNUS,

Petitioners,

v.

ROGER AARONS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

I. THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S BROAD RULING THAT THE FOURTH AMENDMENT CATEGORICALLY PERMITS LENGTHY HANDCUFFING DURING SEARCHES IN NON-DANGEROUS CIRCUMSTANCES.

The petition for certiorari squarely presents the conflict between the Fourth Circuit's construction of the Fourth Amendment and *Muehler v. Mena*, 544 U.S. 692 (2005), and *Michigan v. Summers*, 452 U.S. 692 (1981), as well as decisions of the Ninth and Tenth Circuits. Given the obvious importance of the question

presented, which may arise in any search by state or federal officers, this Court's intervention is required. *See* Pet. 25-26.

1. The United States' reliance on the fact that agents were searching for "evidence related to a terrorism investigation," BIO 12, which it presumably recites to suggest the agents faced danger, misdescribes both the facts and the Fourth Circuit's legal holding.

Factually, the dozen-plus agents faced no risk, making it unreasonable to detain Dr. Unus' wife and daughter in handcuffs for four hours. The court of appeals held that the handcuffing satisfied the Fourth Amendment, notwithstanding that the agents were *not* "concerned about the Unus residence being connected to terrorism-related activity, and that they did *not* anticipate that the residence might house weapons or dangerous persons." *Id.* 23a (emphasis added). That was objectively right: no member of the Unus family has a criminal record; and there was no reason to believe weapons were at the residence.

Nor did the search's subject matter suggest risk. The "evidence" to which the United States so vaguely refers – which did not exist because the allegations were a sham, Pet. App. 11a n.8 – was "related" to "terrorism" only in an attenuated sense that suggested no danger: the government suspected that the so-called Safa Group "route[d] money" to groups related to terrorism; in turn, Dr. Unus allegedly "maintains [Safa Group financial] records at his house," creating "'probable cause to believe that the evidence of [federal law] violations' would be found at the Unus residence in the form of Safa Group *financial records*." Pet.

App 8a-9a (alterations in original) (emphasis added).

Consistent with the facts, the Fourth Circuit's legal holding authorizes multi-hour handcuffed detentions whenever the government seeks evidence as inherently non-dangerous as financial records. The government cannot identify any language cabining the ruling below. To the contrary, the court of appeals categorically held that the authority to handcuff all occupants under *Summers* and *Mena* is not limited to searches for contraband or dangerous materials, but instead "applies equally to situations where agents are seeking evidence of federal crimes." Pet. App. 29a n.22. Whether officers search for records of tax evasion, an antitrust conspiracy, or some other white collar crime is completely irrelevant under the Fourth Circuit's holding, and no one can doubt that the decision will be applied in precisely that manner.

The other facts on which the government leans similarly do not reduce the significant conflicts created by the ruling below. In every search, officers will "not *know* whether they would be confronted by resistance." BIO 13 (quoting Pet. App. 31a-32a) (emphasis added). Resistance is always possible in the wholly hypothetical sense it might have arisen here, despite all expectations to the contrary. But the premise of the ruling below is that the objective circumstances gave no reason to anticipate any resistance or danger from the Unus family, and in fact petitioners gave *no resistance*.

Similarly, residents will almost inevitably be initially "excite[d]" and "agitated," *id.* (quoting Pet. App. 32a), particularly when officers break into the

home with a battering ram and guns drawn, as the court of appeals itself acknowledged in correctly describing the entry as a "harrowing experience" for petitioners, Pet. App. 28a. Given that there were over a dozen armed federal agents on the scene, once calm was promptly restored, the hours-long continued handcuffing of two women suspected of no wrongdoing and who presented no danger was unreasonable.

2. The United States' argument that review is inappropriate because petitioners' claims under the Federal Tort Claims Act require them to prove that the agents committed a tort under Virginia law lacks merit.

a. As the United States explains, "[u]nder Virginia law, it is neither false imprisonment nor assault or battery for a police officer to restrain one's liberty or engage in unwanted touching if the officer's conduct was legally justified." BIO 10. "Justification," which is the only disputed element of petitioners' claims, is a question of *federal* law because a seizure that violates the Fourth Amendment obviously is not reasonable or "legally justified." The government repeatedly made precisely that point below: "Because the Commonwealth's law requires that, in order to recover for assault, battery or false arrest, the evidence establish that the detention or touching lacked adequate legal justification, at least insofar as it applies in a case such as this in which the conduct of a law enforcement officer is at issue, the Commonwealth's law of torts *incorporates* the Fourth Amendment's excessive force analysis." Gov't C.A. Br. 35 (emphasis added). *See also id.* 35-36 (addressing "the Fourth Amendment analysis

by which the question of 'legal justification' *is to be resolved*" (emphasis added)).[1]

The Fourth Circuit thus correctly explained that "[a] police officer's conduct in executing a search warrant is judged in terms of its reasonableness within the meaning of the fourth amendment to the United States Constitution and Article I, § 10 of the Constitution of Virginia." Pet. App. 25a (quoting *Lewis v. Commonwealth*, 493 S.E.2d 397, 399 (Va. 1997)).[2] Accordingly, in deciding petitioners' "false imprisonment and battery claims," the court of appeals did not cite Virginia law, but instead rested its ruling exclusively on the "consistent[] recogni[tion] that *the Fourth Amendment* protects a citizen's right to be free from unreasonable seizures." Pet. App. 29a (emphasis added). In turn, every precedent that the Fourth Circuit applied in evaluating petitioners' claims, *id.* 28a-33a, addressed only the Fourth Amendment, not state law: *Muehler v.*

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[1] Thus, while the FTCA does not technically address a "Fourth Amendment *claim*," BIO 9 (quoting Pet. 5) (emphasis added), it does turn entirely on the Fourth Amendment's *meaning*.

[2] The Virginia Constitution's privacy provision is "co-extensive" with the Fourth Amendment. *El-Amin v. Commonwealth*, 607 S.E.2d 115, 116 n.3 (Va. 2005); *accord Henry v. Commonwealth*, 529 S.E.2d 796, 798 (Va. App. 2000). That parallelism is common, and this Court consistently reviews such cases; the government does not contend otherwise. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 37 (1996); *Pennsylvania v. Labron*, 518 U.S. 938, 941 (1996) (per curiam); *Maryland v. Garrison*, 480 U.S. 79, 83-84 (1987); *Michigan v. Long*, 463 U.S. 1032, 1043-44 & n.10 (1983); *Delaware v. Prouse*, 440 U.S. 648, 651-53 (1979).

Mena; *Michigan v. Summers*; *Valladares v. Cordero*, 552 F.3d 384 (4th Cir. 2009); and *United States v. Photogrammetric Data Serv., Inc.*, 259 F.3d 229 (4th Cir. 2001).

The United States nonetheless claims that the Fourth Circuit relied on "the priority of officer safety under Virginia law," BIO 7, which the government pitches as a "[n]otabl[e]" basis for declining review, *id.* 10, because the court's Fourth Amendment analysis supposedly "was filtered through the lens of Virginia's emphasis on officer safety," *id.* 11. That would be a substantial argument if it were true, but in fact it is pure invention. The single sentence in question noted the reliance of a "Virginia" *court* on "the safety of the officer," Pet. App. 26a (quoting *Harris v. Commonwealth*, 400 S.E.2d 191, 194 (Va. 1991)); but it manifestly did not describe that as a proposition of "Virginia *law*," *contra* BIO 7 (emphasis added), for the understandable reason that the case decided only "whether a police officer violated the Fourth Amendment's prohibition against unreasonable searches and seizures." 400 S.E.2d at 192.[3]

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[3] The United States makes the identical glaring error in claiming that the ruling below "relied on Virginia law" with respect to petitioners' assault claim, BIO 11, though the government's point would be irrelevant even if true, because the petition concerns petitioners' distinct claims for battery and false imprisonment. *See* Pet. App. 26a (quoting *Lewis v. Commonwealth*, 493 S.E.2d 397, 399 (Va. App. 1997) (quoting, in turn, *Gladden v. Commonwealth*, 400 S.E.2d 791, 793 (Va. App. 1991) (applying, in turn, not state law but *Ker v. California*, 374 U.S. 23 (1963), and *Miller v. United States*, 357 U.S. 301 (1958)).

b. Contrary to the government's submission that this Court should not decide questions of federal law "in aid of the ultimate question whether" state law was violated, BIO 16, this Court consistently and regularly grants review in just these circumstances. *See, e.g.*, *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1442-43 & n.2 (2009) (state law claim for "breach of trust" required interpretation of federally enacted Apology Resolution); *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) (evidence's "relevance" under state statute required determining scope of federal constitutional right to introduce mitigating evidence); *Ohio v. Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (right to immunity under state statute based on application of Fifth Amendment right against self-incrimination); *Int'l Longshoremen's Ass'n. v. Davis*, 476 U.S. 380, 388 (1986) (state law determination of waiver depended on antecedent interpretation of federal labor law); *Arizona v. Evans*, 514 U.S. 1, 7, 10 (1995) (interpretation of "the Arizona good-faith statute, Ariz. Rev. Stat. Ann. § 13-3925 (1993)," turned on interpretation of Fourth Amendment).

We are aware of no counter-examples that would support the government's novel contrary position that federal law rulings in this frequently recurring posture should forever evade this Court's review. The United States' invocation of the *Stern & Gressman* treatise for the proposition that "[t]his Court does not generally review a federal court of appeal's determination of a question of state law," BIO 11 (citing *Supreme Court Practice* § 4.10, at 261 (9th ed. 2007) (citing, in turn, *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944)), is misplaced because the question here is

the meaning of the Fourth Amendment, not state law. The relevant point, which the government ignores, is that it is "'well established'" that this Court will decide a "federal question that has been incorporated in the state law." *Supreme Court Practice* § 3.23, at 212 (quoting *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 150, 152 (1984)).

Nor does the government identify any pragmatic basis for denying review. To the contrary, this Court's role is critical. At the urging of the United States, the Court has recently heavily emphasized civil suits, rather than the exclusionary rule, as the favored remedy for Fourth Amendment violations. *E.g.*, *Herring v. United States*, 129 S. Ct. 695 (2009); *Hudson v. Michigan*, 547 U.S. 586 (2006). Petitioners brought just such claims, and did so in the only way possible: as common law tort claims under the FTCA, together with a parallel Fourth Amendment *Bivens* claim that the court of appeals held was precluded by the dismissal of the FTCA claims. But now the United States reverses course and implausibly argues that - notwithstanding that petitioners' FTCA claims turn *entirely* on whether the agents' conduct violated the Fourth Amendment because the only disputed issue is whether the lengthy handcuffing was "legally justified" - it is the *state courts*, rather than this Court, that are the final arbiter of the federal Constitution's meaning in this federal lawsuit. However, "it is the province and duty of this Court 'to say what the law is.'" *United States v. Nixon*, 418 U.S. 683, 705 (1974) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

II. THIS COURT SHOULD REVIEW THE FOURTH CIRCUIT'S HOLDING THAT THE DISMISSAL OF AN FTCA CLAIM REQUIRES THE DISMISSAL OF CLAIMS AGAINST INDIVIDUAL DEFENDANTS IN THE SAME ACTION.

The Petition demonstrated that this Court should grant certiorari to resolve the widely acknowledged circuit conflict over whether the FTCA's judgment bar, 28 U.S.C. § 2876, applies to claims against individual defendants when an FTCA claim in the same action is dismissed.

1. The government's principal submission that petitioners waived this argument by not raising it in the court of appeals, BIO 16-18, is disingenuous because it omits that the judgment bar was not the basis for the ruling from which petitioners appealed.[4] Instead, the government invoked the judgment bar as an alternative basis for affirming the dismissal of petitioners' *Bivens* claims, and even then discussed the statute's meaning in only a *single paragraph*. *See* App., *infra*. Petitioners led their reply brief with a section responding to the government's reliance on the judgment bar. Pet. C.A. Br. Part I-A. The

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[4] *See* Pet. App. 19a, 21a (*Bivens* claims were dismissed on qualified immunity and limitations grounds); *id.* 101a-02a (after dismissing petitioners' FTCA claims on the ground that the agents' conduct was not "inherently unreasonable given all of the factors involved," district court ruled that petitioners' motion for reconsideration of the dismissal of their First Amendment *Bivens* claim was "moot" because the FTCA rationale meant "that the activities of the officers were reasonable under the circumstances known to the officers at the time they took their action").

court of appeals then squarely decided the issue giving rise to the question presented. It held, as the government has advised this Court, that a "FTCA judgment [does] bar [a] *Bivens* judgment in the same suit." BIO 7, *Manning v. United States*, No. 08-1595, *cert. denied*, 130 S. Ct. 552 (Nov. 9. 2009).

Because the court of appeals thus "passed upon" the question presented, and because it would be unreasonable to hold that petitioners were required to brief not merely the judgment bar (which they did), but also every subsidiary issue possibly implicated by the government's passing invocation of that alternative ground for affirmance, this Court has jurisdiction and petitioners did not "waive" the issue. In *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), the Court applied its "traditional rule is that '[o]nce a federal *claim* is properly presented, a party can make any *argument* in support of that claim; parties are not limited to the precise arguments they made below.'" *Id.* (citing *Yee v. Escondido*, 503 U.S. 519, 534 (1992)) (emphasis added). Further, "even if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .'" *Id.* (collecting cases) (emphasis in original).

Because the only effect of denying review would be to allow this recurring circuit conflict to fester, certiorari should be granted.

2. Review also is warranted because this case perfectly illustrates the implausibility of the government's reading of the judgment bar. It is

undisputed that petitioners could not have invoked the FTCA to press their First Amendment *Bivens* claim that the agents interfered with their religious obligations, because that claim has no common law analog. *See* Pet. 24. Directly contrary to even the United States' one-sided explication of the judgment bar's purpose, petitioner had *zero* "opportunity" to "sue a financially responsible defendant" for the agents' unconstitutional conduct, BIO 19, so that the judgment bar here does not protect against "further litigation arising out of the same incident," *id.* 20, but instead entirely extinguishes petitioners' right to pursue that claim at all.

This Court's intervention is required because the Ninth Circuit would have permitted petitioners to pursue their *Bivens* claims. The United States acknowledges that *Kreines v. United States*, 959 F.2d 854 (9th Cir. 1992), "hold[s] that when the government prevailed on a plaintiff's FTCA claim, Section 2676 did not bar the plaintiff from recovering on a *Bivens* claim brought within the same suit." BIO 22. The assertion that *Kreines* reflects "an intra-circuit conflict," *id.*, is meritless. As the United States acknowledges, *id.*, *Kreines* expressly distinguishes prior Ninth Circuit authority. *See* 959 F.2d at 838. The government's submission that *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995), "cast doubt on" *Kreines*, BIO 23, is startling: on that very page, *Gasho* actually reaffirms the holding of *Kreines* that "an FTCA judgment in favor of the government [does] not bar the *Bivens* claim when the judgments are 'contemporaneous' and part of the same action." The government similarly fails to account for

district court rulings faithfully applying *Kreines*. *See* Pet. 23. Eighteen years after *Kreines*, and sixteen after *Gasho*, there is no prospect that the Ninth Circuit will depart from its long-settled position.

Nor can *Kreines*' holding be trivialized as a mere "exception" to a more general rule that the judgment bar applies to FTCA and *Bivens* claims brought in a single case. *Contra* BIO 21-22. When the plaintiff *prevails* on a FTCA claim, ordinary principles of remedy law already preclude a duplicative recovery under *Bivens*. The judgment bar thus has its principal effect when the plaintiff instead *loses* the FTCA claim, as in this case. As the many decisions giving rise to the circuit conflict demonstrate, that scenario recurs regularly.

3. Finally, there is no merit to the government's passing reliance on the denial of certiorari in No. 08-1595, *Manning v. United States*, *supra*. That case presented a question on which the courts of appeals are *not* divided: whether the judgment bar *ever* applies to FTCA and *Bivens* claims in the same suit. No. 08-1595 Pet. i. The circuit conflict presented by this petition was sufficiently tangential in *Manning* that the petition there urged it as a basis for review only in a single paragraph, Pet. 11, and the United States in turn addressed it only in a footnote, BIO 11 n.3. Further, the petitioner in *Manning* sought a double recovery: not only did his FTCA and *Bivens* claims overlap, but he was offered (but declined) the option to dismiss the FTCA claim and preserve his *Bivens* judgment. Finally, unlike *Manning*, this case permits the Court to consider the disposition of petitioners' FTCA and *Bivens* claims together,

and thus to address the interaction of those claims that lies at the heart of the judgment bar.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix

Excerpt from Government's Court of Appeals Brief

Section 2676 of title 28 provides

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

In *Freeze v United States*, 343 F.Supp.2d 477 (M.D.N.C. 2004, *aff'd* 131 Fed.Appx. 950 (4th Cir. 2005), 2005 WL 1220900, the district court noted that

> The judgment bar applies regardless of the outcome of the underlying FTCA action. *See Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir.1996) ("There is no indication that Congress intended that section 2676 to apply only to favorable FTCA judgments." This judgment bar precludes even constitutional claims against federal employees. *Id.* (" ' any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment' " (*quoting Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir.1994))).

See also Aetna casualty & Surety Co. v. United States, 570 F.2d 1197, 1200 (4th Cir.), *cert. denied*, 439 U.S. 821 (1978). Section 2676 bars a *Bivens* claim against a government employee "arising out of the same actions, transactions, or occurrences" as an FTCA claim. *Harris v. United States*, 422 F.3d 322, 333 (6th Cir.2005); *Serra v. Pichardo*, 786 F.2d 237, 239 (6th Cir.1986); *see also Arevelo v. Woods*, 811 F.2d 487, 490 (9th Cir.1987). Indisputably, plaintiffs' First and Fourth Amendment claims arise from the conduct of one or more of the members of the search team, all of whom were federal employees acting within the scope of their federal employment. Thus, entry of judgment in the United States' favor on the plaintiffs' claims under the FTCA precluded "any action" by the plaintiffs "against the employee of the government whose act or omission gave rise to the claim."